Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1502

EDWIN DAVID BANTA and GEORGE HOHMANN,
Petitioners,

v.

UNITED STATES OF AMERICA and FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
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Petitioners Edwin David Banta and George Hohmann, Intervenors below, pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on February 2, 1977.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reprinted in the Appendix at pp. 1-19. The Order of the Court of Appeals denying Petitioners' Petition for Rehearing or in the

Alternative for Rehearing En Banc is reprinted in the Appendix at p. A 20. The Order of the Court of Appeals denying the Petition of Defendant-Appellee City of St. Louis for Rehearing is reprinted in the Appendix at p. A 21.

The opinion of the United States District Court for the Eastern District of Missouri is reported at 410 F. Supp. 948 and is reprinted in the Appendix at p. A 23. The unreported Order of the District Court is reprinted in the Appendix at p. A 22 and the District Court's "Nunc Pro Tunc Order" is reprinted in the Appendix at p. A 51.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1977. Petitioners' timely Petition for Rehearing along with that of the City of St. Louis were denied on February 25, 1977. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether Title VII of the Civil Rights Act of 1964, as applied to the States and their political subdivisions by the Equal Employment Opportunity Act of 1972 mandating the "disparate impact" test of discrimination rather than the "intentional discrimination" test, is "appropriate legislation" within the meaning of Section Five of the Fourteenth Amendment?

Whether the Court of Appeals correctly decided that it need not consider Intervenors' arguments based on constitutional issues that were not raised in the District Court where those arguments were asserted in support of a favorable lower court ruling and where there were intervening decisions of the Supreme Court which arguably changed the state of the law?

Whether the decision of the Court of Appeals, creating its own standard for employment test validity, conflicts with the EEOC Guidelines on Employee Selection Procedures and with the Congressional intent expressed in 42 U.S.C. § 2000e-2(h), as recognized in *Griggs v. Duke Power Co.*, of allowing rather than discouraging the use of professionally developed ability tests?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent sections of the Constitution of the United States provide:

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Fourteenth Amendment:

> Section 1. . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The pertinent sections of Title VII of the Civil Rights Act of 1964, as amended, provide:

Section 701:

> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions . . .
>
> (b) The term "employer" means a person engaged in an industry affecting commerce . . . (42 U.S.C. § 2000e)

Section 703:

(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. (42 U.S.C. § 2000e-2)

STATEMENT OF THE CASE

This is a consolidated case involving two actions. The first was brought by the Firefighters Institute for Racial Equality (FIRE) and certain individual black firefighters (Private Plaintiffs) against the City of St. Louis, Missouri and certain City Officials, alleging violations of the Fourteenth Amendment, Title VII and 42 U.S.C. §§ 1981 and 1983 by *inter alia*, using a selection procedure for promotion to the position of Fire Captain which had a disproportionate impact on blacks. The second action was brought in the name of the United States of America also alleging violations of the Fourteenth Amendment, Title VII and 42 U.S.C. §§ 1981 and 1983. Intervenors are white firefighters who represent a class of 177 white firemen who have undergone testing and evaluation and who are currently on an eligibility list for promotion to the rank of Fire Captain.

Pursuant to the Charter of the City of St. Louis, the City is required to give competitive examinations for positions in the Fire Department, including the position of Fire Captain. Although the City had never attempted to validate its tests prior to the 1972 amendments to Title VII, it did hire an industrial psychologist, Dr. Lawrence O'Leary, in 1973 to develop valid selection procedures for the ranks of Fire Captain, Battalion Chief, Deputy Fire Chief and Fire Chief.

A Fire Captain is a first line supervisor responsible for one piece of equipment and a crew of three or four other men. He leads his men at the scene of a fire, he is responsible for his crew's inservice training, and he performs inspections of buildings and has other administrative duties. See *St. Louis Fire Fighters Ass'n Local No. 73 v. City of St. Louis*, unpublished opinion of Missouri State Board of Mediation (February 23, 1977) (A. 58 at A. 61).

Dr. O'Leary performed a detailed job analysis of each position and developed selection procedures for each rank. For the rank of Fire Captain, Dr. O'Leary used an experience and training score (weighted 45%), a service rating (weighted 10%) and a written test (weighted 45%) (Court of Appeals, A. 3). He recommended a working test period (probation) to be graded on a pass-fail basis after implementation of an improved rating system. Since almost all candidates for promotion scored within a narrow range on both the experience and

training rating and on the service rating, the written test was the most significant factor in determining positions on the eligibility list. The written test was shown to have had a disparate effect on blacks. The mean score for blacks on the test was 69.72 while the mean for whites was 76.59. 25.5% of the blacks passed while 43.6% of the whites passed. A total of 453 persons took the test. Normally, 18 promotions to Fire Captain are made from each promotional list which is valid for two years from the date of certification (August, 1976 in this case), and the first black on the list was fifty-fifth.

OPINION OF THE DISTRICT COURT

With respect to the 1974 Fire Captain written examination, the trial court found that the test was content valid within the EEOC Guidelines on Employee Selection Procedures (410 F. Supp. 948 at 959, A. 43). The Court discredited the criticisms of Plaintiffs' expert witness and found that the job analysis was carefully and thoroughly done, that the test item selection was proper, and that the failure to include supervisory questions on the test was professionally sound, and further, that supervisory abilities would be tested in the working test period (410 F. Supp. at 954, 958-59, A. 33-34, 41-43). The Court held that a possible alternative for testing supervisory skills, the Assessment Center, was neither feasible nor required (410 F. Supp. at 955, 959, A. 33, 42).

With respect to the other issues in the case, the District Court held on the basis of statistical evidence alone, that the entry level test was discriminatory. The City had attempted no validation of that test. The Court found that Private Plaintiffs had not shown disparate impact with respect to the Battalion Chief and Fire Chief tests and that certain individual plaintiffs had not been discriminated against. Private discrimination in eating arrangements, so-called "supper clubs", was found to involve no illegal conduct by the City.

OPINION OF THE COURT OF APPEALS

With regard to the Fire Captain exam, the Court of Appeals agreed with the District Court that Dr. O'Leary had performed a thorough and complete job analysis. The Court held, however, that there was a "fatal flaw" in that the findings in the job analysis were not reflected in the test. "The Captain's exam admittedly failed to test the one *major* job attribute that separates a firefighter from a fire captain, that of supervisory ability." (Court of Appeals, A. 8, emphasis in original). The Court relied on the fact that a Fire Captain spends more time in supervision (43%) than in any other job function. This holding was made in the face of the finding that of six tasks ranked, supervision was fourth in importance (Court of Appeals, A. 8).

The Court cited as authority the 1974 American Psychological Assocation *Standards for Educationa' and Psychological Tests* for the proposition that "all or nearly all" important parts of a job must be tested to achieve content validity (Court of Appeals, A. 9). The Court concluded:

> The test is not *content* valid. In short, even a common sense concept of content validity, aside from EEOC and APA Standards, requires that an important and distinguishing attribute be tested in some manner to find the best qualified applicants. Here, where the exam failed to test a job component comprising over 40 percent of the employee's time, the inference of discrimination has not been rebutted with a finding of the exam's "job relatedness." (Court of Appeals, A. 10, emphasis in original).

On the other issues, the Court of Appeals affirmed the rulings of the District Court regarding the other tests and the alleged discrimination against certain individual plaintiffs. The Court disagreed with the trial court regarding the "supper clubs" and ordered the City to forbid the use of City facilities to any "supper club" which excluded firemen on the basis of their race. No appeal was taken as to the lower court's ruling on the entry level.

REASONS FOR GRANTING THE WRIT

1. The Petition Presents an Important Unresolved Issue of Constitutional and Statutory Interpretation Affecting Every State and Political Subdivision Which Is an "Employer" Within the Meaning of Title VII.

The question of whether the application of the "disparate impact" test of discrimination under the 1972 amendments of Title VII to the States and their political subdivisions in the field of employment practices was a proper exercise of congressional authority under Section 5 of the Fourteenth Amendment, is one with which the Supreme Court has not yet dealt. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), this Court decided that Congress could appropriately, in accordance with Section 5 of the Fourteenth Amendment, provide that back pay and awards of attorneys' fees and costs against states be recovered from states in the face of a claim that the Eleventh Amendment bars such remedies. The Court, however, noted (Footnote 11) that the application of the substantive provisions of Title VII to the States was not being challenged. 427 U.S. at 456. That is precisely what is being challenged in this case.

In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court (while reserving the question of authority under the Fourteenth Amendment, 426 U.S. at 852, n. 17) held that Congress had no power under the Commerce Clause to interfere with the setting of minimum wages and hours of employees of state and local governments. The Tenth Amendment was cited in support of the Court's reasoning that there were limits on the authority of Congress to interfere with the integrity of the States. If Congress cannot set minimum wages and hours of state employees, what right, if any, does Congress have to dictate who these employees shall be or what race, sex or religion they shall have?

Obviously, the Fourteenth Amendment plays some part in answering the above question. The extent of the role of Congress under Section 5 is what is now being put before the Court. Under the Fourteenth Amendment, a plaintiff must prove an act of intentional discrimination to prevail in a case of alleged discriminatory employment practices by a state or local government. *Washington v. Davis*, 426 U.S. 229 (1976). A determination of whether Congress has the power to dispense with the intent requirement of the Fourteenth Amendment in applying that amendment to the States through Title VII requires, as Petitioners view the question, a balancing between the States' rights preserved by the Tenth Amendment and the later limitation of those rights and corresponding increase in the power of Congress embodied in the Fourteenth Amendment. To the extent possible, there should be a harmonizing of these conflicting rights.

The power of Congress, acting under Section 5 of the Fourteenth Amendment is undoubtedly broad as was held in *Ex parte Virginia*, 100 U.S. 339 (1880), and more recently in *Katzenbach v. Morgan*, 384 U.S. 641 (1966) and others. It seems to Petitioners, however, that Congress' power to enforce the prohibitions of the Fourteenth Amendment is not appropriately exercised when Congress applies a more stringent standard of discrimination to the States than the Constitution requires, especially in view of the rights of the States in determining their own employment policies under the Tenth Amendment. In other words, Title VII is not "appropirate legislation" to enforce the Fourteenth Amendment as it has been applied to the States.

The importance of this question to state and local governmental employers is patent, and it has already been recognized by this Court in its grant of certiorari in *Hazelwood School District v. United States*, 45 U. S. Law Week 3463 (Jan. 11, 1977, No. 76-255). This case presents the virtually identical constitu-

tional issue. As applied to the instant case, a ruling that intentional discrimination must be shown would require reversal of the Court of Appeals and reinstatement of the judgment of the trial court at the Fire Captain level and would require a reversal of the District Court's judgment at the entry level as a matter of plain error. While plaintiffs attempted to prove intentional discrimination at trial, the evidence with respect to the Fire Captain exam shows not only no intent to discriminate but also an intention to avoid discrimination. The evidence regarding the entry level only shows that blacks did not score as well as whites on the written test. They were in the past (since 1969), however, hired in proportion to their occurrence in the population (approximately 40%). Cf. *Casteneda v. Partida*, — U.S. —, 45 U.S. Law Week 4302 (March 23, 1977).

Interestingly, since the decision in *Washington v. Davis, supra*, courts without any further guidance from the Supreme Court have been drawing contrary conclusions as to the effect of that case on causes of action brought under 42 U.S.C. §§1981 and 1983 and the Fourteenth Amendment which were also alleged in this case. A double standard between Title VII and the other types of cases is sometimes established. (See Court of Appeals, A. 5.) For instance, in a case based on 42 U.S.C. §1983, a District Court, reconsidering its prior finding of discrimination held, "Applying the teachings of *Washington v. Davis*, it is now manifest that a racially discriminatory purpose or policy in making assignments and transfers must be shown in order to establish the Shield Club's claim that assignments are made within the C.P.D. in a discriminatory manner." *Shield Club v. City of Cleveland*, — F. Supp. —, 13 FEP Cases 1373 at 1380 (N.D. Ohio, 1976). In another case, a court relied on *Washington v. Davis* to dismiss plaintiffs' 42 U.S.C. §1983 claims but held that a test validated against performance in a training program was not sufficiently validated under Title VII and distinguished *Washington v. Davis* on the grounds that it

was a 42 U.S.C. §1981 case. *League of United Latin American Citizens v. City of Santa Ana*, — F. Supp. —, 13 FEP Cases 1019 (C.D. Cal., 1976). However, the Ninth Circuit subsequently held in another case that the validation standards for tests under 42 U.S.C. §1981 and Title VII are the same and that good faith was no defense in a 1981 action. *Davis v. County of Los Angeles*, — F.2d —, 13 FEP Cases 1217, at 1221 n. 13 and at 1223 n. 17 (9th Cir., 1976). On the other hand, the Seventh Circuit holds that different standards apply to Title VII cases than those based on the Fourteenth Amendment. *U.S. v. City of Chicago*, — F.2d —, 14 FEP Cases 462 (7th Cir., 1977). With regard to validation of tests against police academy performance the Court said: "*Although the applicability of the [Supreme] Court's holding [in Washington v. Davis] to cases arising under Title VII is not clear*, even if a relationship between examination performance and police academy performance would be enough to establish job-relatedness for Title VII purposes, we do not read the district court's opinion as expressing a finding that such a relationship exists." (14 FEP Cases at 475, emphasis supplied). The Court reversed the District Court's finding of a constitutional violation. 13 FEP Cases at 478. Finally, in a case involving alleged sex discrimination in the Alabama Highway Patrol and Department of Public Safety, a three-judge district court held that different standards of discrimination apply in 1983 and Title VII cases. *Mieth v. Dothard*, — F. Supp. —, 13 FEP Cases 1412, at 1420 (M.D. Ala., 1976), *probable jurisdiction noted* — U.S. —, 45 US Law Week 3399 (Nov. 30, 1976).

Petitioners respectfully submit that the Court should clarify the confused state of the law in this area and that if a double standard is to be applied, it should be a standard distinguishing between conduct of public and private employers rather than a double standard applied to public employers depending upon what statutory or constitutional violation is alleged.

II. The Failure of the Court of Appeals to Consider the Constitutional Issue Raised on Appeal Is Such a Departure From the Accepted and Ordinary Course of Judicial Proceedings as to Call for the Exercise of the Supreme Court's Power of Supervision.

In footnote 5 of its opinion the panel of the Court of Appeals states in part: "Intervenors in this appeal . . . have strongly contested Congress' power to dispense with the **intent** requirement in Title VII cases where state and local governments act as employers . . . In any event, the court determines that it need not reach this issue. Counsel for the Intervenors has admitted under the court's questioning that the constitutional issue was not raised below." (Court of Appeals, A. 5, emphasis in original). By failing to consider the substantial and important issue raised by Intervenors on appeal, the Court of Appeals has departed from its own precedent and the cases of this Court.

A. It is generally recognized that in defending a judgment on appeal, a party may rely on any ground which supports the judgment. This was recognized by the Eighth Circuit in the recent case of *Tiedeman v. Chicago, Milwaukee, St. Paul and Pac. R. Co.*, 513 F.2d 1267 (8th Cir., 1975), where the Court stated:

> "An appellee cannot attack a judgment either to enlarge his rights thereunder or to lessen the rights of his adversary unless he files a cross-appeal (citations omitted). However, an appellee may . . . defend a judgment on any ground consistent with the record . . . Here appellee does not attack the judgment in its favor rendered below. It merely asserts additional grounds for affirming the judgment." 513 F.2d at 1272.

In accord are Supreme Court decisions *Dandridge v. Williams*, 397 U.S. 471 (1970), note 8 at 475; and *Jaffke v. Dunham*,

352 U.S. 280 (1957) ("A successful party in the District Court may sustain its judgment on any ground that finds support in the record." 352 U.S. at 281); and Eighth Circuit decisions *Aetna Insurance Co. v. Eisenberg*, 294 F.2d 301 (8th Cir., 1961); and *Standard Accident Insurance Co. v. Roberts*, 132 F.2d 794 (8th Cir., 1942). See also, 9 *Moore's Federal Practice* ¶ 204.11[13] (2nd Ed., 1975), at 932. On this basis alone the Court of Appeals should have considered the constitutional question raised.

B. One exception to the general rule that an issue cannot be raised for the first time on appeal is a change in the controlling law after the trial court's decision and prior to determination on appeal. In the instant case, the District Court's decision was handed down on April 9, 1976. The Supreme Court did not decide *Washington v. Davis, National League of Cities v. Usery* and *Fitzpatrick v. Bitzer* until June 7, June 24 and June 28, 1976, respectively. Intervenors, citing these cases, suggested that they changed the law with respect to employment discrimination cases under Title VII and that the cases suggested the existence of a serious constitutional issue regarding the application of Title VII to the States. The Court of Appeals, however, chose to ignore the issue because it was not raised below. This choice was contrary to its own prior decision in *Johnson v. U. S.*, 434 F.2d 340 (8th Cir., 1970), where the Court stated:

> "While the general rule is that issues not raised before the trial court cannot be considered upon appeal, limited exceptions to such rule have been recognized. One such exception is a change in the controlling law subsequent to the triel court's decision and prior to the determination on appeal." 434 F.2d at 342.

In accord is the Supreme Court's decision in *Hormel v. Helvering*, 312 U.S. 552 (1941), where one of its own decisions intervened in the period between the ruling of the Board of Tax

Appeals and the decisions of the Court of Appeals. The Supreme Court very recently had no problem in applying its ruling in *Washington v. Davis, supra*, to a case where the issue of intentional discrimination was not considered controlling by either the trial court or the Seventh Circuit. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, . . . U.S. . . ., 45 U.S. Law Week 4073 at 4078 (Jan. 11, 1977). Similarly, this Court has granted certiorari in the Hazelwood School District case, No. 76-255, where the Petition for Certiorari indicates that the constitutional issue was not raised below because the cases relied on (*Washington v. Davis* and *National League of Cities*) had not been decided when the Court of Appeals ruled. Obviously, the cases relied on by Intervenors arguably created a change in the controlling law and therefore, the constitutional issue should have been dealt with by the Court of Appeals.

C. Another exception to the general rule that an issue cannot be raised for the first time on appeal is a situation where an important issue of public policy is called into question. In the instant case, the constitutionality of the application of Title VII to the States is such an important public policy question.

Pursuant to 28 U.S.C. §2106, appellate courts may modify, reverse or remand a lower court decision "as may be just under the circumstances." The purpose of the existence of courts is to render justice and not to woodenly apply procedural rules to defeat this ultimate goal. In cases where substantial questions of public importance have been raised for the first time on appeal, Courts of Appeals have exercised their discretion to consider such important questions. *K-2 Ski Co. v. Head Ski Co., Inc.*, 506 F.2d 471 at 475 (9th Cir., 1974); *Brennan v. Gilles Cotting, Inc.*, 504 F.2d 1255 (4th Cir., 1974); and *O'Neill v. U. S.*, 411 F.2d 139 (3rd Cir., 1969). In this case, the arguments of the Intervenors were fully briefed on the merits in the Reply Brief of the United States and none of the

Appellants challenged these arguments on the basis that they were not presented to the District Court. The important constitutional question should have been answered and it was an abuse of discretion for the Court of Appeals to fail to reach that issue.

III. The Decision of the Court of Appeals Is in Conflict With the EEOC Guidelines on Employee Selection Procedures and the Avowed Purpose of Congress in Enacting 42 U.S.C. §2000 e-2(h), as Recognized by This Court in Griggs v. Duke Power Co., of Allowing Rather Than Discouraging the Use of Professionally Developed Ability Tests.

A. In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), this Court gives a detailed analysis of the legislative history of Section 703(h) (42 U.S.C. §2000e-2(h)) and specifically holds that job-related tests were to be allowed. 401 U.S. at 433-436.

> "Nothing in the Act precludes the use of testing or measuring procedures; *obviously they are useful*. What Congress has forbidden is giving these devices controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. *Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor*, so that race, religion, nationality, and sex become irrelevant. *What Congress has commanded is that any tests must measure the person for the job and not the person in the abstract*." (401 U.S. at 436, emphasis supplied.)

The Court also stated that administrative interpretations of a statute by an enforcing agency are entitled to "great deference" and that since the job-relatedness requirement for employment tests coincided with the Act and its legislative history there was

"good reason to treat the EEOC Guidelines as expressing the will of Congress." 401 U.S. at 434.

The Courts of Appeals since *Griggs*, however, have split on how "great" the "deference" to be given to the Guidelines should be. The First and Second Circuits have developed a moderate approach which admits of the possibility of satisfying the job-relatedness standard of *Griggs* independently of the Guidelines. *Vulcan Society v. Civil Service Commission*, 490 F.2d 387, 394 (2nd Cir., 1973) and *Castro v. Beecher*, 459 F.2d 725, 737 (1st Cir., 1972). The Fifth Circuit at first appeared to recognize that the Guidelines should not be so rigidly applied that they would be absolute mandates, *U.S. v. Georgia Power Co.*, 474 F.2d 906, 915 (5th Cir., 1973) but it has later interpreted *Georgia Power Co.* to compel compliance with the Guidelines to achieve test validity. See *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 221 (5th Cir., 1974). The Sixth and the Eighth Circuits also appear to have adopted a strict compliance rule. *EEOC v. Detroit Edison*, 515 F.2d 301, 317 (6th Cir., 1975); *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345 (8th Cir., 1975). It can be forcefully argued that this Court's decision in *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) requires strict adherence to the Guidelines. The problem with this approach was pointed out in Justice Blackmun's concurring opinion. "I fear that a too rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection. This, of course, is far from the intent of Title VII." 422 U.S. at 449 (Blackmun, J., concurring).

The extent to which the Supreme Court will require strict adherence to the Guidelines, however, is subject to debate since the decision in *Washington v. Davis, supra*. There, for instance, the Court said: "It appears beyond doubt by now that there is

no single method for appropriately validating employment tests for their relationship to job performance . . ." (426 U.S. at 247 n. 13, citing 1966 APA Standards). The Guidelines had previously been interpreted as requiring a criterion related validity study where this was "technically feasible." 29 C.F.R. § 1607.5(a). See e.g. *Douglas v. Hampton*, 512 F.2d 976, 985 (D.C. Cir., 1975); and *Bridgeport Guardians v. Civil Service Commission*, 462 F.2d 1333, 1337 (2nd Cir., 1973). The Court in *Washington v. Davis* also held that a test validated against performance in a training program was sufficiently job-related to be valid. 426 U.S. at 250. This was farther than any other Court had gone in determining how job-related a test must be to be considered valid.

The extent to which the EEOC Guidelines should be given deference is a question which is now also ripe for reappraisal. The teachings of this Court in *Griggs*; *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973); *Washington v. Davis*, and *Gilbert v. General Electric Co.*, 429 U.S. 125 (1976); establish that "deference" need only be given when administrative interpretations of a statute are in accord with the statute's provisions and with the intent of Congress. As was pointed out above, the intent of Congress was to allow the use of employment tests. This suggests that "a more sensible construction of the job relatedness requirement" of the Guidelines should be used. See *Washington v. Davis*, 426 U.S. at 251. On July 14, 1976, the Equal Employment Opportunity Coordinating Council (EEOCC) published its "Uniform Guidelines on Employee Selection Procedures", 41 *Fed. Reg.* 29016, which were prepared prior to the decision in *Washington v. Davis*. These guidelines differ in significant respects from the EEOC Guidelines, especially with respect to the preference for criterion related validity, espoused by the Commission and rejected by the Coordinating Council (*compare* 29 C.F.R. § 1607.5(a) *with* Uniform Guidelines § 5, a, 41 *Fed. Reg.*

29018); with respect to use of validation techniques other than those set out in the Guidelines (*See*, Unform Guidelines § 3,b, 41 *Fed. Reg.* 29017); and with respect to what is required to demonstrate content validity. (*Compare* 29 C.F.R. §§ 1607.5 and 1607.6 *with* Uniform Guidelines §§ 12,c, (1)-(6) and 13,c, 41 *Fed. Reg.* 29424, 29021). The EEOC, which did not agree with the formulation of the Uniform Guidelines published by the Coordinating Council felt it necessary to republish its 1970 Guidelines *in toto* and unchanged on November 24, 1976. 41 *Fed. Reg.* 51984-51986. Even the Court of Appeals in this case read *Washington v. Davis*, as "undermining" a requirement of the E.E.O.C. Guidelines preferring criterion related validity to content validity. (Court of Appeals, A. 7.)

Petitioners respectfully submit that this Court's recent pronouncements and the significant differences in the published guidelines of the governmental agencies responsible for the enforcement of equal employment laws of the land seriously call into question the extent, if any, to which the courts should give deference to these guidelines.

B. Regardless of the issue of "deference", the decision of the Court of Appeals is in actual conflict with all the accepted published guidelines and standards for employment tests, and with the intent of Congress in Section 703(h). The Court, in fact, created its own standard, the "common sense concept of content validity" (Court of Appeals, A. 10) which it applied in the following manner:

1. The Fire Captain job requires that approximately 43% of his time be spent in "supervision."
2. "Supervision" is rated fourth in importance among the various functions of a Fire Captain.
3. "Supervision" can't be tested for in a written test and would only be evaluated under Dr. O'Leary's selection system *after* the man was placed on the job.

4. Therefore, "Here, where the exam failed to test a job component comprising over 40 percent of the employee's time, the inference of discrimination has not been rebutted with a finding of the exam's 'job-relatedness.' " (Court of Appeals, A. 8-10).

The finding of "job-relatedness" referred to by the Court was the holding of the District Court that: "The job analysis conducted herein convinces this Court that *the areas tested sufficiently identify suitable candidates for promotion.*" 410 F. Supp. at 959 (emphasis supplied, App. . . .). The Court citing *Bridgeport Guardians, Inc., supra*, found support for the proposition that a non-comprehensive written examination can be legally used. This proposition has become the law in *Washington v. Davis*, 426 U.S. at 252. The District Court found the exam to be content valid and said: "Neither a perfect examination, nor an examination without a disparate impact is a necessity, where, as here, *the employer has established that the examination has been validated in accordance with recognized methods.*" 410 F. Supp. at 959 (Emphasis supplied), A. 43. The Court of Appeals held that ". . . it is this court's opinion that an erroneous legal standard was applied in reaching that conclusion." (that the test identified suitable candidates for promotion); (Court of Appeals, A. 10). Petitioners submit that it was the Court of Appeals and not the District Court which applied an erroneous legal standard.

The evidence at trial established, the District Court found, and the Court of Appeals refused to challenge the finding that Dr. O'Leary's job analysis of the Fire Captain's job was "thorough and complete." (Court of Appeals, A. 8, fn. 9). The Court of Appeals also refused to hold the exam invalid for the areas of job knowledges which it attempted to cover. (Court of Appeals, A. 13). The "fatal flaw" was that the test did not go far enough in that it did not test "supervisory" skills. (Court of Appeals, A. 8). (To the extent that the job analysis demonstrated that job knowledge was a mandatory prerequisite for

performing a Fire Captain's functions, the written test did test "supervisory skills.")

As was pointed out above, there is no requirement that a test be thoroughly comprehensive in order to be content valid. The EEOC Guidelines contain no such requirement. The American Psychological Association's *Standards for Educational and Psychological Tests and Manuals* (1966), which are adopted by reference in the EEOC Guidelines and its recently republished Guidelines §1607.5(a) (41 Fed. Reg. at 51985), contain no such requirement. The newer 1974 APA *Standards for Educational and Psychological Tests* (not "and Manuals"), which were not adopted by the EEOC and on which the Court of Appeals placed specific reliance, contain no such requirement. Additionally, the 1974 Standards specifically provide:

> "A final caveat is necessary in view of the prominence of testing issues in litigation. This document is prepared as a technical guide for those within the sponsoring professions; *it is not written as law*. What is intended is a set of standards to be used in part for self-evaluation by test developers and test users. *An evaluation of their competence does not rest on the literal satisfaction of every relevant provision of this document*. The individual standards are statements of ideals or goals, some having priority over others. Instead, an evaluation of competence depends on the degree to which the *intent* of this document has been satisfied by the test developer or user." (1974 Standards at 8, emphasis supplied.)

Here the Court of Appeals treated the 1974 *Standards* as law and applied them more than literally. Further, the Uniform Guidelines of the Coordinating Council specifically allow the use of non-comprehensive tests which still may have content validity. See §12c(3) which provides in part, ***Where the domain or domains measured are critical to the job, OR constitute a substantial proportion of the job, the selection procedure will be considered to be content valid for the job.***" (41 Fed.

Reg. at 29020, emphasis supplied.) Here, the domains measured are both critical to the job ("It was clear from the interviews conducted that knowledge of fire fighting and inspection were considered to be *very important*." 410 F. Supp. at 959, A. 42, emphasis supplied), *and* the areas tested constituted a substantial proportion (over 50%) of the job.

The portion of the 1974 APA Standards quoted and relied on by the Court of Appeals provides:

> "An employer cannot justify an employment test on the grounds of content validity if he cannot demonstrate that the content universe includes *all, or nearly all,* important parts of the job." (Court of Appeals, A. 9, emphasis in Court's opinion.)

The Court ignored the disjunctive nature of the above-quoted language and required that the only important area not tested *directly* before placing a man on the job, i.e., supervisory skills, also be tested in order for there to be content validity. This is contrary to the applicable law and guidelines and contrary to the intent of Congress that the use of tests be allowed.

The Court of Appeals suggested the use of a very expensive selection procedure (the "Assessment Center," about $500 per candidate estimated cost if done as for position of Fire Chief) which has been shown to successfully test supervisory skills. However, there was absolutely no evidence in the record that the use of an "Assessment Center" would have any less serious racial impact than the written test. In fact, a suit is now pending in the Eastern District of Virginia where an "Assessment Center" was used for fire department promotions and it did have a disparate impact on blacks. *Roscoe Friend, et al. v. City of Richmond, et al.*, Civil Action No. 74-0327R, Eastern District of Virginia, Richmond Division. It also appears that the Court of Appeals has placed more importance on the importance of supervisory skills than they carry with respect to the Fire Captain rank. See the opinion of the Missouri State

Board of Mediation which included Fire Captains in the same collective bargaining unit with Fire Fighters. *St. Louis Fire Fighters Ass'n, Local No. 73 v. City of St. Louis,* unpublished opinion (February 23, 1977), at A. 64.

The decision of the District Court that the 1974 written Fire Captain exam was content valid is in accord with the EEOC Guidelines, the 1966 and 1974 APA Standards, the new EEOCC Uniform Guidelines and the intent of Congress in enacting Section 703(h). In *Griggs* this Court said, "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. at 431. Here the test has been demonstrated to be content valid, it is therefore "demonstrably a reasonable measure of job performance." 401 U.S. at 436. Candidiates for promotion are measured for the job of Fire Captain and not in the abstract.

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX I

United States Court of Appeals
For the Eighth Circuit

Nos. 76-1507 and 76-1663

Firefighters Institute for Racial Equality, et al.,
Plaintiffs-Appellants,
v.
City of St. Louis, et al.,
Defendants-Appellees,

United States of America,
Plaintiff-Appellant,
v.
City of St. Louis, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

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Submitted: October 14, 1976

Filed: February 2, 1977

Before Lay, Ross and Stephenson, Circuit Judges.

Ross, Circuit Judge.

In this consolidated action, black firefighters and the Department of Justice allege the existence of racially discriminatory

practices in the St. Louis City Fire Department. In the first action the Firefighters Institute for Racial Equality (F.I.R.E.) and several named plaintiffs represent a class who are presently employees or who seek employment with the St. Louis Fire Department. The United States subsequently filed suit under Title VII of the Civil Rights Act of 1964 seeking redress for a "pattern or practice" of discrimination as well as for individuals not represented by F.I.R.E. Both actions were filed pursuant to 42 U.S.C. §§ 1981, 1983 and 2000e *et seq.* The principal defendant, the City of St. Louis, is joined in its argument by the Intervenors who represent a class of nonblack employees and candidates for employment in the fire department.

Appeal is taken on a number of issues, but no appeal has been taken with respect to the examination for *firefighter* which is the *entry level* position in the fire department.[1] The F.I.R.E.-Appellants do contest the City's promotional practices with regard to the fire captain's exam and the battalion chief's exam. Also charged as unlawful are exclusion of blacks from firehouse eating arrangements known as "supper clubs," and the failure to promote a black individual, George Horne, to a fire captain position. F.I.R.E. also contests the amount of attorney's fees which the district court indicated it would award.

Of these issues, the United States appeals on only two: the promotional exam for *fire captain* and the supper club discrimination issue. This court considers the latter as the principal claims, and reverses with respect to them. The district court is affirmed with respect to the battalion chief exam and in the matter of George Horne.

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[1] The *firefighter* exam was shown to have had a disparate racial effect and was not violated. *See* nunc pro tunc order 2 (June 28, 1976). The order was entered on June 28 and amended the April 9, 1976 memorandum opinion which had included the parties partial consent decree on the entry level issue. On June 28 the court issued an order pursuant to the stipulation of the parties granting relief similar to the partial consent decree. The June 28 order required defendants *inter alia* to try to achieve a 50 percent hiring rate for blacks in filling vacancies at the entry level over the next five years.

Fire Captain's Examination

The position of fire captain is the first level supervisory job in the St. Louis Fire Department. According to the findings of the district court, fire captains are responsible for the supervision of a group of men and equipment on a particular work shift. The in-service training of the firefighters under his command is a significant part of the fire captain's job. According to the City's validation study, the fire captain leads his company at the fire scene.

Promotion to the fire captain's position is dependent on a composite score developed from three measurements of an individual's qualifications. For candidates on the 1974 eligibility list which is at issue here, the "written test" was given a 45 percent weight as was an "experience and training score." The "service rating" score was weighted as 10 percent of the composite.

Attaining the rank of fire captain is a highly sought-after and competitive goal of both blacks and whites. From the 1974 procedure now under scrutiny a total of 453 persons are seeking the higher position of captain, while only approximately 18 persons are needed to fill vacancies during the two-year life of the eligibility list. The highest ranking black man ranks as number 55 out of a total of 189 on the list. As a prerequisite for consideration all applicants for fire captain must have served five years as a firefighter.[2]

The experience and training score, which comprised 45 percent of the total score, is also a function of *length* of service with the fire department. According to the district court, points

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[2] F.I.R.E. has alleged that the change of the in-service requirement from five to seven years from 1967 up until 1974, when it was changed back to five years, adversely affected black applicants. However, the change, which was instituted both times on the recommendations of consultants, admittedly affected white candidates as well as black.

are awarded for each month of experience with the department. In 1974 all applicants with ten or more years experience received the maximum score of 45 points. Eighty-one percent of those who made the 1974 eligibility list for the captain's position received the maximum number of points for experience and training.

While the experience and training score is largely quantitative, the "service rating" is qualitative, and reflects the individual's last supervisory rating prior to announcement of the written exam. On this measurement of qualification, 93 percent of the persons on the eligibility list received scores in the narrow range between 7.8 and 9.2.

At trial Dr. O'Leary, the City's test analyst and expert witness, testified that these two work-related ratings were included because he felt that experience on the job and the quality of that experience were important factors in evaluating potential fire captains.[3]

It appears that as a practical matter these two scores carry less weight than their assigned value indicates. For many of those 189 persons who made the eligibility list, these two experience-based scores are closely clustered, making the written exam of much greater weight in determining final rank than the allotted weight of 45 percent.

It is not disputed here that the 1974 written exam for the fire captain's position adversely affected black candidates as a

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[3] Dr. O'Leary also testified that determining the relative *weight* of the three scores was a matter of judgment and he knew of no mathematical or statistical procedure to objectively determine the weight to be accorded each criteria. This opinion was refuted to a certain extent by the plaintiff's expert, Dr. Barrett, who indicated that weighting is best arrived at by some empirical means such as a criterion-related validity study. In any event, it has not been argued on this appeal that the use of an experience and training score or a service score has resulted in a discriminatory impact on black candidates.

whole. The district court concluded that the statistical evidence presented established that the test had a disparate impact on blacks.[4]

It is a distinguishing feature of a Title VII cause of action that discriminatory impact suffices to establish a prima facie showing of discrimination. The recent case of *Washington v. Davis*, 426 U.S. 229, 239 (1976) establishes that a law or official act is not unconstitutional solely because it has a racially disproportionate impact regardless of whether it reflects a racially discriminatory purpose. However, Congress' statutory standard for Title VII, where discriminatory purpose need not be proved, is unshaken by the *Washington* decision. *Id.* at 246-47.[5]

It is now a familiar principle that Title VII was not meant to preclude the use of testing devices, and that what is forbidden is the controlling use of such tests "unless they are demonstrably a reasonable measure of job performance." *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

Once a racially adverse impact is demonstrated, the burden of proof shifts to the employer to prove the job relatedness of the exam he has utilized. *Albemarle Paper Co. v. Moody*, 422

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[4] The mean score for blacks on this exam was 69.72; the mean for whites was 76.59. Of those blacks taking the exam 25.5 percent received a passing score; 43.6 percent of the whites passed.

[5] In 1972 Congress amended 42 U.S.C. § 2000e and included state and local governments, such as the City of St. Louis under the rubric of "employers" subject to that Act. Intervenors in this appeal, citing *National League of Cities v. Usery*, 44 U.S.L.W. 4974 (June 24, 1976) have strongly contested Congress' power to dispense with the *intent* requirement in Title VII cases where state and local governments act as employers. The *Cities* case, *supra*, limiting Congress' power to impose wage and hour standards for state and local employees under the commerce clause, is undoubtedly inapposite. *But see Fitzpatrick v. Bitzer*, 44 U.S.L.W. 5120 (June 28, 1976). In any event, the court determines that it need not reach this issue. Counsel for the Intervenors has admitted under the court's questioning that the constitutional issue was not raised below.

U.S. 405, 425 (1975). Accepted professional methods of "validating" exams for their job-relatedness are found in the EEOC Guidelines published in 29 C.F.R. § 1607.5 (1975). The Supreme Court has said of these test validation techniques:

> The EEOC Guidelines are not administrative "regulations" promulgated pursuant to formal procedures established by the Congress. But, as this Court has heretofore noted, they do constitute "[t]he administrative interpretation of the Act by the enforcing agency," and consequently they are "entitled to great deference." (Citation omitted).

Albemarle Paper Co. v. Moody, supra, 422 U.S. at 431.

Though it has been argued here that the EEOC Guidelines, which refer to the standards of the American Psychological Association (APA), should be considered "guidelines *only*" these standards have often been sanctioned as a means by which courts may professionally evaluate the validity of employment tests when called upon to do so.[6]

It is also true that in this case Dr. O'Leary, the City's expert who developed and validated the test, purportedly considered and reviewed the APA and EEOC publications as guidelines in preparing the examination.

Accepted validation techniques under these standards include two forms of criterion-related validity, plus the content and construct validity methods. Criterion-related studies involve the correlation of job performance with success on an examination.

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[6] *See, e.g., Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975): "These guidelines have been cited with approval by the Supreme Court, followed by all courts dealing with these issues, and recognized as controlling in at least one circuit. We think it unwise to depart from these accepted principles at this stage in the development of the law concerning equal employment opportunity." *Id.* at 986 (footnote omitted). *See also, Kirkland v. New York St. Dept. of Correctional Serv.*, 520 F.2d 420, 426 (2d Cir. 1975); *Vulcan Soc'y of New York City Fire Dept., Inc. v. Civil Serv. Comm'n*, 360 F.Supp. 1265, 1273 n.23 (S.D.N.Y. 1973).

Predictive validation requires a comparison between an applicant's test scores and subsequent on-the-job performance as an employee; *concurrent* validation methods correlate the test scores of *present* employees vis-a-vis their *present* job performance. *Vulcan Society of New York City Fire Dept. v. Civil Service Commission*, 490 F.2d 387, 394 (2d Cir. 1973). These empirical methods are, of course, dependent on statistical correlations as proof of reliability and validity. Content validity, the technique chosen by Dr. O'Leary for justification of the fire captain's exam, generally requires that the examination reflect a representative sample of the knowledge or behavior that will be used in performance of the job.

The F.I.R.E.-Appellants have argued on this appeal that a *content* validity study should not have been undertaken by the City and that type of test should be used *only* when a criterion-related study has proved to be technically infeasible.[7] This argument is now undermined by the Supreme Court's recent observation in *Washington v. Davis*, 426 U.S. 229 (1976), that "[i]t appears beyond doubt by now that there is no *single* method for appropriately validating employment tests for their relationship to job performance." *Id.* at 247 n.13 (emphasis added).[8] Although in this court's opinion content validation, *if properly done*, could be an acceptable means of evaluation for the City to undertake, it is no more acceptable than a criterion-related test, especially if such criterion-related test involves concurrent validation testing methods with present fire captains.

Constructing a content valid exam and proof of its validity requires as a first step a thorough analysis of the job to be per-

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[7] *See* 29 C.F.R. § 1607.5(a) (1975).

[8] Newly proposed regulations provide that "[f]or the purposes of satisfying these guidelines users may rely upon criterion related validity studies, content validity studies, or construct validity studies • • •." 41 Fed. Reg. 29018 (1976).

formed. The district court concluded, and this Court does not challenge the finding, that Dr. O'Leary's analysis of the fire captain's job was thorough and complete.[9]

It is in fact the fatal flaw in the validation study that the test Dr. O'Leary devised did not reflect his findings in the job analysis. The captain's exam admittedly failed to test the one *major* job attribute that separates a firefighter from a fire captain, that of supervisory ability. From the interviews conducted for the job analysis, the City's expert determined that almost 43 percent of a fire captain's time was spent in supervision, a higher percentage of time than on any other single element. Of the six tasks ranked as the "most important," supervision was fourth. There was no attempt to test supervisory skills prior to selecting the new captains. The City admits this lack of proper testing for supervisory ability but claims the best method of doing it, through an Assessment Center approach, is too expensive.

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[9] Twenty-seven fire captains were interviewed in the preparation of this job analysis. Those interviewed were asked to describe the elements of the job and rank their relative importance. Captains were questioned concerning the positive and negative critical incidents of the job, and the essential and desirable qualities of a fire captain.

A pool of questions for the exam were obtained through the International Governmental Personnel Management Association; according to Dr. O'Leary, a series of items tailor-made by the department were also included. Questions on the exam were distributed according to the importance of each area of knowledge. The best items were selected after review by several technical and test advisors. *See United States v. City of St. Louis*, 410 F.Supp. 948, 954 (E.D. Mo. 1976).

Dr. Barrett's main objection to the job analysis was that in his opinion the descriptions of job activities and skill levels were incomplete. He also acknowledged, however, that the 27-person sample, interview technique, and cataloging of information used by Dr. O'Leary were reasonable methods. Considering the district court's evaluation of the two experts' credibility, this court will not disturb the lower court's conclusion about the *job analysis*. Compare the job analysis in this case with the cursory preparation disapproved in *Vulcan Soc'y of New York City Fire Dept., Inc. v. Civil Serv. Comm'n, supra*, 360 F.Supp. at 1275.

The EEOC Guidelines accept evidence of content validity for tests "that consist of suitable samples of the *essential* knowledge, skills or behaviors composing the job in question." 29 C.F.R. § 1607.5(a) (1975) (emphasis added). Similarly, the APA Standards, which the EEOC Guidelines refer the reader to, clearly warn that:

> An employer cannot justify an employment test on grounds of content validity if he cannot demonstate that the content universe includes *all, or nearly all,* important parts of the job.

AMERICAN PSYCHOLOGICAL ASSOCIATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS 29 (1974) (emphasis added).

It is clear that this court's objection to this test is similar to the objections of other courts. In a decision where Blacks and Hispanics challenged the *content* validity of a correction officer's exam, the court also questioned the test's lack of comprehensiveness:

> More serious perhaps than specific item flaws is the fact that, regardless whether 34-944 adequately tests the attributes it is intended to measure, it fails to examine a number of traits, skills and abilities which witnesses for both sides singled out as important to the Sergeant job. Among these are leadership, understanding of inmate resocialization, ability to empathize with persons from different backgrounds, and ability to cope with crisis situations.

Kirkland v. New York State Dept. of Correctional Services, 374 F.Supp. 1361, 1378 (S.D.N.Y. 1974), *aff'd in relevant part*, 520 F.2d 420 (2d Cir. 1975). In *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission, supra*, 360 F.Supp. at 1274, *aff'd*, 490 F.2d 387 (2d Cir. 1973), the court quite simply stated: "[a]n examination has content va-

lidity if the content of the examination matches the content of the job."[10] Though the district court was "convinced" from the *job analysis* that the "areas tested sufficiently identify suitable candidates for promotion," it is this court's opinion that an erroneous legal standard was applied in reaching that conclusion. The job analysis here may have appeared impressive in relation to those challenged in other cases, but a good analysis in any situation is of little use when the examination fails to reflect what is found in the job analysis. The test is not *content* valid. In short, even a common sense concept of content validity, aside from EEOC and APA Standards, requires that on important and distinguishing attribute be tested in some manner to find the best qualified applicants. Here, where the exam failed to test a job component comprising over 40 percent of the employee's time, the inference of discrimination has not been rebutted with a finding of the exam's "job-relatedness."

Both experts agree that there is no good pen and paper test for evaluating supervisory skills. In his validation study Dr. O'Leary had anticipated that supervisory ability would be judged after an employee had been selected and placed on the job through the use of a "six month working test period." According to the validation study, the individual's supervisory abilities would be "closely scrutinized" and his performance evaluated on a pass/fail basis. Whatever merit this idea may have as a means of eliminating unfit employees after they are chosen, it

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[10] The court continued: "It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job." 360 F. Supp. at 1274. *See also Douglas v. Hampton*, 512 F.2d 976 (D.C. Cir. 1975). " 'Content' validity is established when the content of the test *closely approximates* the tasks to be performed on the job by the applicant." *Id.* at 984 (emphasis added) (footnote omitted). *See also Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1338 (2d Cir. 1973). Dr. O'Leary said at trial: "Content validity is validity demonstrated when one can show that the content of the predictors * * * are *very close* to the content of the job that the person is going to be performing." (Emphasis added).

cannot substitute for a valid selection method utilized at the outset to fairly pick the best employees in a nondiscriminatory manner. The many who are not picked for the "working test period" obviously have no opportunity to compete or to raise their rank by a demonstration of their ability. Significantly, the City's director of personnel testified that though the working test portion has "always existed" he did not know whether a fire captain had ever been eliminated because of his performance during that period. Used in this manner, the probationary period would prove even less valuable as a means of selection.

Both experts also testified at trial concerning an excellent method of supervisory evaluation known as the Assessment Center technique. Dr. O'Leary had himself used it for the deputy and fire chief examination in St. Louis, labeling it as "one of the most effective methods" available. He described the Assessment Center as a selection procedure which uses individual and group exercises that simulate job responsibilities while assessors evaluate a candidate's performance. The Assessment Center was apparently rejected for choosing fire captains because of the large number of persons who wish to take that test. The evidence indicates that the assessment technique takes at least one day and costs as much as $500 per person.

Dr. Barrett, who is enthusiastic about this approach as well, has suggested a means for reducing the expense through the use of a content valid screening test. As the court understands his testimony, the written test would be a screening device *only*, eliminating those persons who obviously did not possess the requisite job knowledge to perform at the captain's level. The Assessment Center could then be used to *rank* those persons who successfully complete the written exam. Dr. Barrett, however, also testified that this cutoff score would need to be relatively low. As Dr. Barrett testified, another possible screening device is performance ratings given from the lower level job.

This court clearly does not have enough evidence in the record or testing expertise to devise a complete remedy for testing supervisory skills using the Assessment Center or any other method. Other courts have dealt with the problem and in similar causes of action concerning invalid exams have directed "executive or administrative officials to live up to their responsibilities and to prepare and conduct an examination consonant with the Fourteenth Amendment." *Vulcan Society of New York City Fire Dept., Inc. v. Civil Service Commission, supra,* 360 F.Supp. at 1278.

Other courts have also dealt with the necessity of testing *supervisory* skill where that attribute was critical. In affirming the district court's rejection of New York City's exam for school principals, the court of appeals said:

> The [district] judge did not outlaw other written examinations or indicate that none could be created to test more fairly the qualities necessary for a supervisory job. It may well be that new testing procedures will be devised by the parties themselves and be approved by the district court.

Chance v. Board of Examiners, 458 F.2d 1167, 1179 (2d Cir. 1972) (footnotes omitted).

This court will take the same general approach of urging the parties on remand to devise a test of supervisory skills to be approved by the district court. The one caveat is that the final test *must be validated* in accordance with the published EEOC Guidelines. This may be accomplished by devising a content valid test or by a concurrent criterion-related validity test. The Assessment Center is a concededly good device, but the court will not at this point *require* that approach to be the sole method finally used. Whatever test is used should provide equal reliability and validity. Because of the difficulty of devising a test properly reflecting the supervisory skills of the ap-

plicants, it is possible that a criterion-related concurrent validation test coupled with a limited use of the Assessment Center would meet the guidelines. Cost to the City is one factor which may be considered in deciding whether to use the Assessment Center technique,[11] but it may not be the sole deciding factor.

The district court shall have continuing jurisdiction until a valid exam is devised by the parties to these cases, if possible, and may require reports or take evidence on testing procedures as it deems necessary. The final plan will be subject to that court's approval.

Both appellants also argue that the test has a number of "flawed items" which invalidate the written exam even for the areas of job knowledge it has attempted to cover. At trial Dr. Barrett had criticized many of the individual questions that were used on the test.[12] Tnough Dr. Barrett gave examples of each of his specific criticisms, his testimony does not render the trial court clearly erroneous. When asked if each item on a test had to be valid in order for the whole test to be valid, he replied that it did not. He previously admitted not having made a study of the entire fire captain's exam to determine the *total* number of poor and unrelated questions. This court agrees that some improvement could be made in this area.

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[11] If a screening device is used in conjunction with the Assessment Center, development of a fair cutoff score is obviously important. The EEOC Guidelines provide:

> It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

29 C.F.R. § 1607.6 (1975).

[12] Dr. Barrett objected to "tenuous linkage" in some questions; questions where a correct answer did not guarantee adequate performance on the job; and questions that gave a premium to the test-wise individual. Other items, he said, called for "esoteric information" not related to job performance.

Supper Clubs

The second principal claim concerns the exclusion of blacks from the "supper clubs." Supper clubs are informal eating arrangements among on-duty firefighters at firehouses in the St. Louis Fire Department. Cooking facilities, stove, refrigerator, and cabinets for storage, are provided by the City for the use of its on-duty personnel. Each supper club provides for its own utensils and condiments and buys food for the shared meals. A cook is chosen, who the district court found, "has the discretion and authority to determine who is a member of the club." The clubs are not organized or regulated by the Fire Department.

As a finding of fact the district court concluded that blacks have been excluded from many of these clubs. These exclusions, the court found, *frequently* result in blacks, where a minority in a firehouse, cooking and eating apart from their white associates.

The district court felt that such segregation was "offensive" and "incomprehensible" but concluded that because no Fire Department directive or order promoted the exclusivity, the court would not intervene. The district court did indicate that if the problem persisted it would seek a solution.

The existence of segregated supper clubs was accepted as a fact by the district court and that fact is accepted here. This court as well finds the exclusion of black co-workers by whites highly offensive, and regards the situation as one which the Fire Department could remedy by appropriate regulations.

In *Rogers v. Equal Employment Opportunity Commission*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), the court in determining tl.at the Commission possessed "the statutory authority to investigate psychological fringes in an employment relationship," discussed the scope of Title VII's authority to alleviate race discrimination:

> This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits. * * *
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> * * * * * * *
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> * * * Therefore, it is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. * * * One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.

See also Wilson v. Woodward Iron Co., 362 F.Supp. 886, 896 (N.D. Ala. 1973). The language in *Rogers* is apposite to the situation in this case.

The City provides the cooking facilities in each firehouse for use by its on-duty personnel as part of their employment; it is clear that city officials have been made aware of the segregated eating arrangements in the firehouses for sometime and have protested their inability to solve the problem to the district court.

On remand of this case to the district court, that court should renew the interest it had indicated it had in an ongoing review of the supper club problem by supervising the Department's promulgation of new regulations. Those regulations should provide that use of city facilities by supper clubs may not continue in a discriminatory and segregated manner. In other words the supper clubs may not use City kitchen facilities if they refuse membership to blacks. In this way the City may comport with its duty to provide a nondiscriminatory working environment; additionally, the inclusion of blacks and the reduction of racial tension in firehouses cannot help but aid the City as an employer where the job at hand requires the close cooperation of its employees and a concerted team effort.

Battalion Chief's Exam and the Matter of George Horne

The F.I.R.E.-Appellants have appealed the district court's decision that a prima facie case of racial discrimination was not shown with respect to the use of the battalion chief's examination. We affirm. It is undisputed that results from the *exam* showed no disparate racial impact. Two of the three blacks who took the examination passed it and at least one will be appointed to the higher level supervisory position. F.I.R.E. argues, however, that a comparison of the racial composition of the employment *pool* with the lack of black battalion chiefs clearly suffices for a prima facie showing of racial discrimination. This argument is rejected. In *Carter v. Gallagher*, 452 F.2d 315, 323 (8th Cir. 1971) this court held that demographical "[s]tatistical evidence can make a prima facie case of

discrimination" in a situation where an all white 535 man Fire Department operated in a large city with a 6.44 percent black population. In St. Louis, eleven percent of the *existing* force is black, and blacks will be hired at a 50 percent rate on the entry level pursuant to the district court's order.

In the case on which F.I.R.E. makes its primary claim for support, the court used census figures to *supplement* "meager exam statistics" which *had* shown a racial disparity. *See Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1020 (1st Cir. 1974). This is obviously not the case here.

Likewise, the district court is affirmed in the matter of George Horne. The district court found that a *union official* had written a letter to Mr. Horne in which he told him that six vacancies would be available. The district court also found that a Deputy Chief had told Horne he would speak to the Fire Chief concerning a promotion. However, only four new fire captains were requisitioned by the Fire Department at that time, eliminating Horne from consideration prior to the expiration of the eligibility list.

F.I.R.E. points to no evidence which suggests that racial discrimination was the Department's motive in making a request for four new captains. In fact, George Horne was sixth on the eligibility list, and a white man who was fifth and would precede Horne was also passed over for promotion.

As a final matter, St. Louis has raised the issue of whether or not the district court erred in not dismissing the suit brought by the United States under 42 U.S.C. §§ 2000e-5(f) and 2000e-6(b). It is the City's contention that the United States could only participate in this suit as an intervenor; that to bring their own suit is duplicative and contrary to the intent of the statute. The United States argues that St. Louis is precluded from raising this issue because of failure to cross-appeal; that the suit by the

United States is brought on the basis of 47 charges filed with the EEOC, 30 of which were not included in the F.I.R.E. complaint; that the United States also proceeded under the pattern and practice authority of § 2000e-6 on behalf of the "public interest" and accordingly, presents policy considerations different from those presented by private litigants; and finally that the consolidation of the cases provides an equivalent practical effect.

We agree with each of the reasons advanced by the United States, (with the exception of the second reason) and, in view of the consolidation of the cases for trial, and the fact that F.I.R.E. raised the same questions as the United States on appeal, we do not consider our determination to be in conflict with *EEOC v. Missouri Pacific Railroad Co.*, 493 F.2d 71 (8th Cir. 1974).

A question is also raised concerning the jurisdiction of the district court to enter its nunc pro tunc order of June 28, 1976.[14] Without passing on this question we direct that at the time the district court reassumes jurisdiction of the cases on remand, it should reenter its order as of that date.

Also at that time the district court should award appropriate attorney's fees to F.I.R.E. for work prior to this appeal. The court had previously indicated it was without jurisdiction to do so after an appeal was taken. Attorney's fees under Title VII may be awarded pursuant to 42 U.S.C. § 2000e-5(k). The fees awarded in this case, both on remand and upon completion of the balance of the case, should be in a fair and reasonable amount in accordance with twelve guidelines set by the court in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In our opinion the award of $3,000 suggested by the trial court is grossly inadequate under these guidelines for work done prior to appeal.

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[14] *See* note 1, *supra*.

Accordingly, the judgment of the district court is affirmed in part, and reversed and remanded in part for further proceedings consistent with the views expressed in this opinion. Attorney's fees for this appeal will be awarded to F.I.R.E. upon submission of affidavits relating to the guidelines described in *Johnson v. Georgia Highway Express, Inc., supra*, 488 F.2d 714.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX II

United States Court of Appeals
for the Eighth Circuit

September Term, 1976

76-1507

Firefighters Institute of Racial Equality, etc., et al.,

Appellants,

vs.

The City of St. Louis, Missouri, etc., et al.,

Appellees.

76-1663

United States of America,

Appellant,

vs.

The City of St. Louis, Missouri, etc., et al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for intervenors-appellees and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 25, 1977

APPENDIX III

United States Court of Appeals
for the Eighth Circuit

September Term, 1976

76-1507

Firefighters Institute of Racial Equality, etc., et al.,

Appellants.

vs.

The City of St. Louis, Missouri, etc., et al.,

Appellees.

76-1663

United States of America,

Appellant,

vs.

The City of St. Louis, Missouri, etc., et al.,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

Petition of appellees for rehearing fiiled in these appeals having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

February 25, 1977

APPENDIX IV

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,
vs.
City of St. Louis, et al.,
Defendants.
No. 74-200 C (4).

Firefighters Institute for Racial Equality, et al.,
Plaintiffs,
vs.
City of St. Louis, et al.,
Defendants.
No. 74-30 C (4).

ORDER

(Filed April 9, 1976)

Pursuant to the memorandum filed this date,

It Is Hereby Ordered, Adjudged, and Decreed that defendants shall have judgment against plaintiffs, and that these causes be and are dismissed at plaintiffs' costs.

/s/ JOHN F. NANGLE
United States District Judge

Dated: April 9, 1976

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,
vs.
City of St. Louis, et al.,
Defendants.
No. 74-200 C (4).

Firefighters Institute for Racial Equality, et al.,
Plaintiffs,
vs.
City of St. Louis, et al.,
Defendants.
No. 74-30 C (4).

MEMORANDUM

(Filed April 9, 1976)

Plaintiffs brought these actions pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and 42 U.S.C. §§1981 and 1983.

These cases were tried before the Court sitting without a jury. The Court having considered the pleadings, the testimony of the witnesses, the documents in evidence, the stipulations of the parties, and being otherwise fully advised in the premises, hereby makes the following findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure:

Findings of Fact

1. Plaintiff, Firefighters Institute for Racial Equality, Inc. is a not-for-profit corporation, organized under the laws of the State of Missouri. Plaintiff, Preston Sims, is a black citizen of the United States, resident of the City of St. Louis, Missouri. Plaintiff Sims was denied employment by the Fire Department, based in part at least upon his failure to pass a written test which was given as a prerequisite for employment by the St. Louis Fire Department. Plaintiffs, George Baker, Robert D. Morgan, Robert Grady, Sherman George, George Redford Turner, Lawrence L. Britt, Vernon Ammons, Wendell H. Goins, Charles Gay, George E. Horne, William L. Young, Daniel S. Austin, Robert Anderson, John H. Harvey, Joseph P. Hughes, and Eugene Stanton are all black citizens of the United States, and residents of the City of St. Louis. All are presently employed by the St. Louis Fire Department. The Attorney General has brought suit on behalf of the United States.

2. Defendant City of St. Louis is a municipality incorporated pursuant to the laws of the State of Missouri and is a political subdivision of that State. Defendant Division of Fire and Fire Prevention is one division within the Department of Public Safety of the City of St. Louis. It operates all firefighting facilities of the City of St. Louis. Defendant Frank C. Cummings is the Acting Chairman of the Civil Service Commission of St. Louis. Defendants Fred Gould and Charles Marino are members of the Civil Service Commission. Defendant Joseph B. Clark is the Director of the Department of Public Safety of the City of St. Louis. Defendant Charles Kamprad is the successor to the originally named defendant Denis Broderick, who subsequently retired as Chief of the Fire Department. Defendant R. Elliott Scearce is the Director of the Department of Personnel for the City of St. Louis, responsible for establishing eligibility lists for employment and promotion by the Fire Department.

3. Intervenor Michael Davis is a non-black employee of the City of St. Louis who has applied for employment with the St. Louis Fire Department. He has a position on both the promotional hiring list and the open competitive hiring list. Intervenors Edwin David Banta and George Hohman are members of a class of 177 non-black firefighters, all of whom have undergone testing for evaluation and promotion to the rank of Fire Captain and all of whom are on the current eligibility list for such promotion. Intervenors Donald Blackwell, Nick Altmeyer and George Tschlis are members of a class of 100 non-black Fire Captains, all of whom have undergone testing and evaluation for promotion to the rank of Battalion Chief and all of whom are on the current eligibility list for such promotion.

4. The Fire Department of the City of St. Louis is a division of the Department of Public Safety of the City of St. Louis. The Director of the Department of Public Safety, Mr. Joseph B. Clark, is an appointee of the Mayor. The Fire Chief is responsible to the Director of the Department of Public Safety. The Fire Chief is responsible for the day-to-day operation and policies of the department. Under the Fire Chief are the Deputy Fire Chiefs, responsible for the management of the department in its day-to-day functions. The Deputy Fire Chiefs each supervise one-third of the Fire Department's personnel, as each is assigned to one of the three shifts. The Deputy Fire Chiefs respond to any and all major alarms of fire. The City of St. Louis is divided, for the purposes of the Fire Department, into seven districts. In charge of each district is the Battalion Chief, who reports to the Deputy Fire Chief. The Battalion Chief has supervision over approximately eight companies, the number varying depending upon the size and fire hazards within each district. The Battalion Chief is responsible for the companies, including the men, officers, equipment, houses, and the fire safety of the individuals and property located within the district. The Fire Captain serves below the Battalion Chief. The Fire Captains work in shifts and are responsible for the men and

equipment under their supervision. The Fire Captain is also responsible for the training of individuals under his supervision.

5. The rank structure of uniformed personnel in the St. Louis Fire Department, in ascending order of rank, is Firefighter, Fire Captain, Battalion Chief, Deputy Chief, and Fire Chief.

6. As of November 30, 1974, there were approximately 1,000 uniformed personnel employed in the St. Louis Fire Department, of whom approximately 110 (11%) were black.

7. Applicants for the entry level position of firefighter are required to be residents of the City of St. Louis on their date of application.

8. On November 30, 1974, there were approximately 180 persons in the rank of Fire Captain, of whom 4 (2.2%) were black. No black has ever held a uniformed position in the Fire Department above the rank of Fire Captain.

9. In the period since November 30, 1964, 95 whites and 1 black have been promoted to the position of Fire Captain. The black was Daniel Austin, promoted to Fire Captain on May 22, 1966.

10. Pursuant to the provisions of the City Charter, appointments to the entry level position of Firefighter, and promotions to higher positions within the Fire Department, are made from eligibility lists prepared by the Personnel Department of the City of St. Louis. The Personnel Department, in response to a requisition for personnel made by the Fire Department and approved by the Director of Public Safety and the Budget Department, certifies to the Fire Department, in order of rank from the appropriate eligibility list, a number of persons equal to the number of vacancies to be filled, plus two. The Fire Department then appoints from those certified the persons it wishes to fill the vacancies.

11. In certifying persons for the entry level position of Firefighter, the Personnel Department first certifies, in order of rank, persons from an eligibility list of qualified applicants who are then permanent city employees (the promotional list). After that list is exhausted, certification is made in order of rank from a list of all other qualified applicants (the open competitive list).

12. An eligibility list expires two years from the date it is established, or when it is pre-empted, whichever is sooner. In the period since November 1, 1964, eligibility lists for the entry level position of Firefighter were established on October 15, 1974; September 28, 1971; March 6, 1969; October 31, 1966; and November 6, 1964. Since January 1, 1962, eligibility lists for the position of Fire Captain have been established in 1962, 1964, 1967, 1969, 1971, and 1974. Eligibility tests for the rank of Battalion Chief were established in 1967, 1969, 1971, and 1974.

Entry Level Positions

13. All persons appointed to the entry level position of Firefighter are required to complete successfully a probationary period of up to one year, including an initial training course in firefighting. Of the 307 persons appointed to the entry position of Firefighter since November 30, 1964, 3 have been terminated for inability to perform satisfactorily the duties of a Firefighter.

14. In 1969 ranking on the open competitive eligibility list was based on the applicant's scores on a written test, a physical strength and agility test and an evaluation of the applicant's experience and education. Minimum passing scores were established for the written and physical tests. Those attaining passing scores on the written and physical tests were ranked on the eligibility list, with the results weighed as follows: 50%

on the written test; 35% on the physical test; and 15% on the education and experience evaluation.

15. In 1971 and 1974, ranking on the open competitive eligibility list was based on the applicant's score on a written test and on a physical strength and agility test, with a minimum passing score established for each test. The results of each test were weighed 50% in the ranking.

16. The mean scores for blacks and whites on the written examination for the entry level position utilized in 1974 were approximately 56.70 and 71.95 respectively. The approximate mean scores attained by blacks and whites on the physical agility test administered in 1974 were 51.24 and 49.13 respectively.

17. Seven hundred thirty-four persons took the written test for the entry level position in 1974, of whom 267 (36.4%) were black. The cut-off score utilized in 1974 for placement on the eligibility list eliminated approximately 51% of the black applicants and 25% of the white applicants who took the two examinations.

18. The current promotional and open competitive eligibility lists contain 26 and 360 names, respectively. Eight (30.8%) of the 26 persons on the promotional list are black. Eighty-one (24.3%) of the 334 persons on the open competitive list (not counting those persons also on the promotional list) are black, including 10 (10%) of the first 100 persons.

19. On June 16, 1975, the parties agreed, with the consent of the Court, to allow the City of St. Louis, its officers and agents, to proceed with the hiring of individuals for the entry level position in accordance with the terms of a "Partial Consent Decree" which is incorporated herein. See Appendix A.

Fire Captain Position

20. For the examinations for the position of Fire Captain, for the eligibility lists established in 1962 through 1965, and in 1974, applicants were required to have served at least five years in the position of Firefighter or above. For the examination for the position for the lists established in 1967 through 1971, applicants were required to have served seven years in the position of Firefighter or above. The increase in the required number of years of service from five to seven years was made on the recommendation of an outside consultant hired by the Fire Department. The decrease for the 1974 eligibility list from seven to five years required service was also made on the advice of an outside consultant.

21. From 1962 through 1971, ranking on the eligibility list for Fire Captain was determined by a written test, an experience and training score, and a service rating. These scores were weighed as follows: 45% on the written test; 40% on the experience and training score; and 15% on the service rating.

22. Ranking on the eligibility list for Fire Captain for 1974 was determined as follows: written test score weighed 45%; experience and training score weighed 45% and service rating weighed 10%.

23. Applicants for the position of Fire Captain were required to meet minimum requirements for experience and service ratings, and achieve a minimum passing score on the written examination in order to be ranked on the eligibility list.

24. The experience and training score of the applicants in 1970 and 1974 was determined by the positions held in the Fire Department in the ten years preceding the application. Points in the final ranking were awarded for each month of experience. In 1974, all applicants with ten or more years experience received 45 points. Applicants with the lowest experience and

training score received 31.5 points. One hundred fifty-four (81%) of the 189 persons on the 1974 eligibility list for Fire Captain received the maximum 45 points for experience and training.

25. The service rating score for applicants in 1971 and 1974 was based on the last supervisory rating received by the applicant prior to the cut-off date on the examination announcement. Applicants who made the minimum scores on the other parts of the examination for the position of Fire Captain received from seven to ten points for service ratings in the final ranking on the eligibility list. One hundred seventy-six persons (93%) of the total 189 persons ranked on the 1974 eligibility list received between 7.8 and 9.2 points for service ratings.

26. The mean scores for black and white applicants on the written test for Fire Captain in 1974 were 69.72 and 76.59 respectively. Forty-seven blacks and 406 whites took the 1974 written examination. Twelve blacks and 177 whites achieved a passing score on the examination. Twelve of the 189 persons (6.3%) on the current eligibility list for Fire Captain are black, with the highest ranked black on the list ranked at number 55.

27. Only approximately 18 persons will be promoted from the 1974 eligibility list.

Battalion Chief

28. For the examinations for Battalion Chief for the eligibility lists established in 1962 through 1965, and in 1974, applicants were required to have served at least five years in the position of Fire Captain or above. For the examination for Battalion Chief for the eligibility list established in 1967 through 1971, applicants were required to have served at least eight years in the position of Fire Captain or above.

29. As stated above, there are currently only 4 black Fire Captains. Of the 3 black Fire Captains who took the 1974

Battalion Chief Exam, 2 passed. One of those two has a sufficiently high ranking that appointment is possible. An adverse impact on blacks has not been established.

Deputy Chief and Fire Chief

30. There is simply no evidence from which to conclude that the examinations for these positions have an adverse impact on blacks.

31. Plaintiffs oppose the time-in-grade requirement for these positions. Although time-in-grade requirements have been increased in the past, they have been lowered to the original requirement in the recent past. Any adverse impact suffered from the increase is no longer in existence.

Selection Procedure

32. It is clear that the differences found in performance by blacks and whites on the Firefighter written examination and the Fire Captain examination are statistically significant.

33. Prior to the effective date of Title VII, as amended to include state and local governments (March 24, 1972), the City of St. Louis made no attempt to validate any of the written tests or other standards or requirements utilized in the selection of persons for entry level or promotional positions in the St. Louis Fire Department.

34. In the spring of 1973, the City of St. Louis hired an outside consultant, Dr. Lawrence O'Leary, to develop a proper selection device.

35. Dr. O'Leary's report indicates that the content validation approach was used in devising the selection procedure because (a) the possibility of collusion by applicants existed, mak-

ing the use of an identical test from year to year undesirable; and (b) because the number of promotions per eligibility list is small, it would be difficult to rely on evidence of a predictive nature derived from small samples. In addition, the lack of valid criteria for work performance precluded the use of a criterion related validity study.

36. Dr. O'Leary proceeded to conduct a job analysis for the position of Fire Captain and Battalion Chief. The methods used for the analysis of the two jobs were essentially the same. Captains, and Battalion Chiefs, were selected at random from each of the districts. Lengthy interviews of up to two hours were conducted. Twenty-seven Fire Captains were interviewed as was one Battalion Chief from each district.

37. The interviews asked for a complete specification of all components of the job, critical incidents, and qualities considered to be necessary or desirable for satisfactory performance of the job. The information obtained was then summarized by tabulating the number of times each different component was mentioned; its ranking in importance by each person interviewed; and the percentage of time spent on each component.

38. Dr. O'Leary made a decision to increase the length of the Fire Captain's examination, from 100 to 125 questions, to achieve higher reliability. He also decided not to measure skills, abilities and personal characteristics, but only the knowledge required for the job. This decision was made because of the undesirability of measuring such items in a paper-and-pencil test.

39. Questions on the examinations were distributed among the knowledge areas required, in accordance with the areas' importance. Questions from which the test was constructed were obtained from the test exchange service of the International Government Personnel Management Association from questions constructed specifically for the tests by researchers. Questions were checked for their applicability to the City of St. Louis.

The best questions were selected. These questions were then shown to the Fire Chief and a Deputy Fire Chief for their approval. The questions were selected after passing the following criteria:

a) approved by at least two members of the three-man validation task force as job related;

b) acknowledged to be job related by an expert panel of technical advisors from the Fire Department;

c) judged to have the least number of words necessary to successfully convey the meaning of the question.

The last criteria resulted from a determination that in prior examinations, minority candidates had difficulty with the longer questions.

40. Dr. O'Leary suggested that supervisory skills, which could not feasibly be included in a written examination, be tested during the working test period.

41. Dr. O'Leary recommended a range within which to establish a cut-off score. The cut-off score chosen, 78, was within the range.

42. Of the 189 persons on the eligibility lists, only a small fraction will actually be appointed during the life of the list.

43. Another possible method of testing for promotions is the Assessment Center approach. Because of the large number of candidates, however, the costs of utilizing such an approach would be prohibitive. The estimated cost was $500.00 per candidate.

44. Dr. Richard Barrett, plaintiffs' expert, raised various criticisms of the examination. Dr. Barrett, however, had never performed a content validity study for a fire department, had not made any study of the knowledge and skill required for the jobs of Fire Captain and Battalion Chief, and had not

even studied any manuals relating to the skills and knowledge needed. Dr. Barrett approved of the use of the working test period and service ratings. He conceded that budgetary considerations would have to be given weight in devising a selection procedure. Although critical of 10 of the 125 questions, Dr. Barrett stated that not every question on the examination needed to be content valid for the test itself to be valid. He further conceded that there had never been a perfect examination.

45. While the Court is aware of Dr. Barrett's credentials in the field, the Court concludes that his opinions herein are not entitled to credence. He was not at all familiar with the jobs involved. His criticisms of the examination amounted to no more than nit-picking. Dr. Barrett was critical of only a small portion of the examination and yet was of the belief that not every question needed be valid in order for the test itself to have validity. His conclusion, that the examination lacked validity, was not supported even by his own testimony. In sum, Dr. Barrett was not an impressive witness herein.

Supper Clubs

46. The evidence establishes that Fire Department personnel have established supper clubs on a very informal basis for the benefit of club members, at the various firehouses. There is no evidence tying or connecting any one club with any other. The members contribute money for the expenses of utensils and food. One member is the cook, who has the discretion and authority to determine who is a member of the club.

47. The cooking facilities themselves belong to the Fire Department. The utensils, however, are the property of the supper clubs.

48. There is evidence that blacks have been excluded from many of these clubs. There is no evidence, however, to indicate that the exclusions were anything more than the individual decisions of some white firemen not to dine with black firemen; these decisions were not the result of any Fire Department directive or order. These exclusions frequently result in blacks, where a minority in a firehouse, cooking and eating apart from their white associates.[1]

49. The problem created by the supper club obviously exacerbates racial tensions and as such, runs counter to the policies of the laws of this country. Yet should a federal court issue some type of mandatory order to each firehouse setting out regulations relating to buying food, preparing it, serving it and eating it? The answer seems obvious. The Director of Public Welfare, Joseph Clark, testified that the problems with the supper clubs were coming under control. Mr. Clark, who himself is black, pledged all his efforts to eradicate this reprehensible practice from the St. Louis Fire Department. This Court believes that, at this time, it is inadvisable to involve itself in these supper clubs. In the event that this problem persists and remains without improvement six months from this date, the Court will reconsider this issue and seek specific proposals from city officials and the parties.

Overt Discrimination

50. George Horne applied for, and was examined for, promotion to the position of Fire Captain in 1969. After the examination, he was ranked twenty-first on the 1969 eligibility list.

51. In the spring of 1971, the Director of Public Safety met with officials of the local firefighters union, and agreed to end the delay in filling Fire Captain vacancies.

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[1] This type of segregation is both offensive and incomprehensible in groups whose very survival depends upon togetherness.

52. Thomas Vetter, a vice-president of the union, surveyed the Fire Department for vacancies. He found that six vacancies existed and so notified Horne of this fact by a letter postmarked August 13, 1971. At that time, Horne was sixth on the list.

53. Alfred Newman, a Deputy Chief of the Fire Department, told Horne that he would speak with the Fire Chief concerning an appointment to Fire Captain.

54. On August 31, 1971, the Department issued a requisition for only four Fire Captains. Therefore, Horne was not appointed. Shortly thereafter, the 1969 eligibility list expired.

55. On December 13, 1971, the Fire Department issued a requisition for four Captains to be appointed from the 1971 eligibility list. That requisition form indicates that two of the positions as Fire Captain had been vacated by death and resignation on September 21, 1971 and July 17, 1971 respectively.

56. The Court is unable to find that Horne was denied promotion because of his race. The requisition form is signed by Denis Broderick, who was the Fire Chief and appointing authority. There is no indication in the record that either Thomas Vetter, a union official or Alfred Newman, a Deputy Fire Chief, had the authority to determine the necessary number of Fire Captains, and requisition the same. Nor does there appear to be a requirement that all vacancies in a position be filled as soon as they appear. Budgetary considerations could well have forced the Fire Chief, assuming that there were in fact six vacancies, to request only four appointments. There is no evidence from which to conclude that the Fire Chief confirmed the fact of six vacancies. Under these circumstances, the Court cannot find that Horne was denied promotion because of his race.

57. There is absolutely no evidence from which to conclude that Preston Sims was denied employment because of his race.

Conclusions of Law

This Court has jurisdiction over the subject matter and of the parties to this action. Defendants' and intervenors' objections to the presence of the United States as plaintiff herein are without merit. See 42 U.S.C. § 2000e-5(f)(1).

As has been frequently stated, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*,

> . . . proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
>
> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a *reasonable* measure of job performance. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 436 (1971) (emphasis added).

The statistical evidence presented establishes that the tests involved had a disparate impact on blacks. Accordingly, the defendant City must establish that the tests are a "reasonable measure of job performance." See also, *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (means of selection must be substantially related to job performance); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972 (there must be a fit between the qualifications and the job; *Douglas v. Hampton*, 512 F.2d 976 (D.C.Cir. 1975) (the test must bear a demonstrable relationship to successful job performance); *United States v. Georgia Power Company*, 474 F.2d 906 (5th Cir. 1973) (manifest relationship between the test and the job is required).

There are various means of establishing the relationship between the examination and job performance.

> The preferred method of test validation is criterion-related or empirical validity, which includes what are referred to as the predictive and concurrent methods of validation. Predictive validation consists of a comparison between the examination scores and the subsequent job performance of those applicants who are hired. If there is a sufficient correlation between test scores and job performance, the examination is considered to be a valid or job related one. Concurrent validation requires the administration of the examination to a group of current employees and a comparison of their relative scores and relative performance on the job.
>
> An examination has content validity if the content of the examination matches the content of the job. For a test to be content valid, the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. It is essential that the examination test these attributes both in proportion to their relative importance on the job and at the level of difficulty demanded by the job. *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission of the City of New York*, 360 F.Supp. 1265, 1273-74 (D.C.N.Y. 1973), *modified*, 490 F.2d 387 (2nd Cir. 1973).

See also, *Boston Chapter, NAACP, Inc. v. Beecher*, 371 F.Supp. 507 (D.C. Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Douglas v. Hampton, supra; Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission*, 482 F.2d 1333 (2nd Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

The Guidelines of the Equal Employment Opportunity Commission authorize the use of a content validation approach

"where criterion-related validity is not feasible." 29 C.F.R. § 1607.5. Dr. O'Leary stated that criterion-related validity was not possible in the present context. Such validation was not feasible because of the lack of valid criteria for work performance, the small number of persons promoted from each eligibility list and the possibility of collusion. Predictive validation, consisting of a comparison between test scores and job performance, raises an additional problem, not mentioned by Dr. O'Leary. Defendants herein were required by law to establish a valid selection procedure. Such a duty was an immediate one. Predictive validation of necessity requires a great deal of time since presumably the applicants must be given a sufficient orientation period in the jobs before their performance is analyzed against their examination scores. See *Commonwealth of Pennsylvania v. Glickman*, 370 F.Supp. 724, 732 (D.C. Pa. 1974). But defendants had the duty to establish a valid selection procedure immediately. If the predictive validation approach were used, a test would have to be constructed, persons chosen for positions on the basis of the results of that test, and at a later date, analyses of their performance made. If the test were found not to be valid, the process would have to begin again. This Court is unable to find authority for granting an employer an exemption from the requirements of the law while a validation study is underway. It is the Court's conclusion that predictive validation would not be feasible and the Court is of the opinion that a content validity approach was the only feasible approach in the present context.

While the Equal Employment Opportunity Commission Guidelines are entitled to great deference, *Albemarle Paper Co. v. Moody*, 43 U.S.L.W. 4880 (1975), it is worth noting that the Guideline requirement that the content validity approach be used only when the other methods are not feasible has been disputed by the Courts. In *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission of the City of New York*, 360 F.Supp. 1265, 1273-74 (D.C.N.Y. 1973),

modified, 490 F.2d 387 (2nd Cir. 1973), the experts involved were of the opinion that concurrent validation was less desirable than predictive validation "because of the possibility that some distortion may result from either the experience or lack of motivation of the current employees who participate in the examination for experimental purposes." *Id.* at 1273. See *Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission of the City of New York*, 490 F.2d 387 (2nd Cir. 1973) (today's preferred method may be rejected tomorrow); *Kirkland v. The New York State Department of Correctional Services*, 374 F.Supp. 1361, 1371 (D.C.N.Y. 1974), *modified*, 520 F.2d 420 (2nd Cir. 1975) (a content-valid examination will not be set aside simply because the other methods of validation were not used). The required burden that the employer must meet is *not* one of compelling interest or lack of feasible alternative, *Chance v. Board of Examiners*, 458 F.2d 1167 (2nd Cir. 1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972), but simply that there is a substantial relationship between the scores and job performance.

Having found that Dr. O'Leary was justified in choosing the content validation approach, the Court must now determine if the examination is valid. In order to be valid, the content of the examination must match the content of the job. In *Vulcan Society, supra*, 490 F.2d at 396, the court stated

> If an examination has been badly prepared, the chance that it will turn out to be job-related is small. *Per contra*, careful preparation gives ground for an inference, rebuttable to be sure, that success has been achieved. A principle of this sort is useful in lessening the burden of judicial examination-reading and the risk that a court will fall into error in umpiring a battle of experts who speak a language it does not fully understand.

See also *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 (2nd Cir. 1975). This Court is not

holding that plaintiffs must rebut an inference created by Dr. O'Leary's qualifications. Nonetheless, it is important to note that the examinations involved were the result of careful and extensive research. In many of the cases cited to this Court, such was not the case. See *e.g.*, *Boston Chapter, NAACP, Inc. v. Beecher, supra* (the test was not professionally developed nor had there been any analysis of the required job skills); *Fowler v. Schwarzwalder*, 351 F.Supp. 721 (D.C. Minn. 1972), *rev'd on other grounds*, 498 F.2d 143 (8th Cir. 1974) (no attempt made to relate the relative importance of job duties or to correlate the same to the number of test questions; no systematic or empirical review of the elements of the job); *Kirkland v. New York State Department of Correctional Services*, 374 F.Supp. 1361, *modified*, 520 F.2d 420 (2nd Cir. 1975) (inadequate job analysis); *Western Addition Community Organization v. Alioto*, 340 F.Supp. 1351 (D.C.Cal. 1972), *appeal dismissed as moot*, 514 F.2d 542 (9th Cir. 1975) (no job analysis performed).

To prove that an examination has content validity,

> . . . defendants must demonstrate not only that the knowledge, skills, and abilities tested for by [the examination] . . . coincide with some of the knowledge, skills and abilities required successfully to perform on the job, but also that 1) the attributes selected for examination are critical and not merely peripherally related to successful job performance; 2) the various portions of the examination are accurately weighted to reflect the relative importance to the job of the attributes for which they test; and 3) the level of difficulty of the examination matches the level of difficulty for the job. *Kirkland v. The New York State Department of Correctional Services*, 374 F.Supp. 1361, 1372, *modified*, 520 F.2d 420 (2nd Cir. 1975).

It is clear from the facts that Dr. O'Leary's analysis and examination comported with these requirements. The job analysis

was thorough and complete. The questions were distributed among the areas of knowledge required in accordance with the importance given to the area by the persons interviewed. The Court is aware of case law indicating that "all or substantially all the critical attributes" of the job must be included in the examination. *Kirkland, supra* at 1372. Plaintiffs herein contend that the examination is invalid because certain skills, such as supervisory skills, were not included in the written examination. Nonetheless, the Court concludes that the examination was valid. Even plaintiffs' own expert approved the use of the working test period, during which time supervisory skills could be more adequately evaluated. He also approved of the use of service ratings. The Equal Employment Opportunity Commission Guidelines themselves impliedly recognize the use of written and evaluative examination. See 29 C.F.R. § 1607.13. Furthermore, there is support in the law for the use of non-comprehensive written examinations. See *Bridgeport Guardians, Inc., supra.* The job analysis conducted herein convinces this Court that the areas tested sufficiently identify suitable candidates for promotion. It was clear from the interviews conducted that knowledge of fire fighting and inspection were considered to be very important.

The Court further concludes that the cut-off score was validly established. The Equal Employment Opportunity Commission Guidelines require that the "cut-off score will be reasonable and consistent with normal expectations of proficiency within the work force or group . . .". 29 C.F.R. § 1607.6. It was clear from the evidence that only a few persons from the eligibility list would be promoted. Under such circumstances, the Court can not conclude that the cut-off score was unreasonable, or inconsistent with the required criteria.

Even plaintiffs' expert conceded that a perfect examination is not possible. A perfect test is a goal "as illusory as perfect

schools or perfect courts . . .". *Boston Chapter, NAACP, Inc., supra,* 504 F.2d at 1022. The Court concludes that the examination had content validity. This is all that the law requires of an employer. Neither a perfect examination, nor an examination without a disparate impact is a necessity, where, as here, the employer has established that the examination has been validated in accordance with recognized methods. The examination for Fire Captain meets the criteria established by law. The Court has found that there was no evidence of a disparate impact in connection with the examinations for Battalion Chief, Deputy Chief and Fire Chief. Accordingly, the burden of establishing that those examinations were valid does not shift to the employer. See *Griggs v. Duke Power Co., supra* at 431.

The Court has found that the exclusions of blacks from the supper clubs was not the result of any actions by defendants, but instead the result of private decisions by individual fire personnel. Under such circumstances, defendants have not violated any statutory duties. Because of the tensions created by the situation, however, the Court will request that defendants do all that they can to eradicate the problem, and will allow plaintiffs to return to Court should the situation persist.

The parties are in dispute as to the meaning of a certain aspect of the partial consent decree. That decree requires the St. Louis Fire Department to establish a racial composition that approximates the racial composition of the City of St. Louis as a whole. The issue disputed is whether the reference group should be the total uniformed personnel of the Fire Department (approximately 1,000 persons) or the total number of Firefighters (approximately 750 persons). It is the Court's conclusion that the latter figure shall control. The terms of the partial consent decree provide that it shall remain in effect until, after a period of five years from the date of entry, defendants move that it be dissolved.

The Court has found that the examination for Fire Captain was properly validated as required by law. Plaintiffs failed to provide a disparate impact as the other promotional examinations. The evidence failed to established that either George Horne or Preston Sims were denied promotion or employment because of their race. Similarly, the evidence failed to establish that the exclusion of blacks from the supper clubs were the result of any actions by defendants. Accordingly, judgment will be entered for defendants.

/s/ JOHN F. NANGLE
United States District Judge

Dated: April 9, 1976.

APPENDIX A

In the United States District Court for
the Eastern District of Missouri
Eastern Division

United States of America, Plaintiffs, v. City of St. Louis, a municipal corporation, et al., Defendants.	Civil Action No. 74 C 30 (4)
Firefighters Institute for Racial Equality, et al., Plaintiff, v. City of St. Louis, Missouri, et al., Defendants.	Civil Action No. 74-200 C (4)

PARTIAL CONSENT DECREE

The United States filed its complaint herein on March 18, 1974, alleging that the defendants were engaged in a pattern and practice of discrimination based on race in hiring for and promotion within the City of St. Louis Fire Department (known formally as the Division of Fire and Fire Prevention of the Department of Public Safety) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., as amended by the Equal Employment Opportunity Act of 1972, Public Law 92-261 (March 24, 1972) and the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. § 1981, and 42 U.S.C. § 1983.

Plaintiffs' Firefighters Institute for Racial Equality, et al., consisting of FIRE and 10 named individuals filed suit on January 11, 1974, alleging *inter alia*, discriminatory practices on part of defendants in their hiring and promotion practices within the fire department of the City of St. Louis. Because of the identity of issues involved, the two cases were consolidated by the Court on March 17, 1975 with the assent of the parties.

It now appears to the Court that the parties have waived a hearing and findings of fact and conclusions of law on those issues raised by the complaint relating to the initial employment of blacks to the position of firefighter, and have agreed to the entry of this partial Consent Decree, which shall in no manner constitute findings on the merits of the case nor be construed as an admission by defendants of any violation of Title VII or of rights guaranteed by the Fourteenth Amendment, 42 U.S.C. § 1981 and 42 U.S.C. § 1983. All issues raised by the complaint with respect to the promotion of blacks and their terms and conditions of employment within the Fire Department are reserved for hearing and adjudication by this Court. Therefore, it is hereby ORDERED, ADJUDGED, and DECREED:

1. Inasmuch as it is a matter of policy and of law for the City of St. Louis not to engage in any act or practice which has the purpose or effect of discriminating against any employee of or any applicant or potential applicant for employment with the City of St. Louis Fire Department because of such individual's race or color, it hereby consents to the entry of an order permanently enjoining such conduct, and defendants are so ordered and enjoined. This does not constitute an adjudication or finding of discrimination against the defendant City. Also, the City maintains its denial of any act or practice of discrimination.

2. The defendants shall, as a long range goal, seek to recruit and hire blacks in sufficient numbers so as to achieve a racial composition in the ranks of Firefighters within the City of St. Louis Fire Department that is more representative of the racial

and ethnic composition of the City of St. Louis as a whole. The goal shall be to achieve a racial composition of Firefighters in the St. Louis Fire Department which is comparable to the civilian labor force for the City of St. Louis subject to the availability of qualified applicants. In order to fulfill this goal and subject to the availability of sufficient qualified black applicants, defendants shall adopt and seek to achieve a goal of hiring blacks for at least fifty percent (50%) of the vacancies for the entry level of Firefighter personnel in the Fire Department for each year during the life of this decree. For purposes of compliance with this goal, only those blacks completing their probationary period shall be counted. In no case shall defendant be required to displace incumbent employees or to hire unneeded employees or unqualified employees in order to meet the goal.

3. The defendant City, through its officials and agents, shall take all reasonable steps consistent with its obligation to meet the goals set forth in paragraph 2 above, including contact with community organizations in the black communities, such as the Urban League and NAACP, and high schools with substantial miniority enrollments, for the purpose of soliciting their help in informing minorities of employment opportunities in the fire department. The City shall also use its own resources, such as the facilities of the Personnel Department to recruit qualified minorities. Such effort on the City's part shall include announcements to radio, television, and other media directed at the black communities. The City shall also cooperate with and assist available independent programs which are aimed at recruiting minorities for the City Fire Department. The defendant City shall also utilize the services of incumbent black Firefighters in its recruiting efforts to the extent that such incumbents are willing and able to assist.

4. Defendants may make appointments from the current eligibility list for Probationary Firefighter so long as they meet the interim goals set out in paragraph 2, but in no event beyond

the expiration of 2 years from the date of establishment of the list. Those blacks on the current list who are not appointed during this interim period and those blacks who applied and completed the written and physical agility tests in the 1971 and 1974 examinations but were not placed on the eligibility list shall be informed by defendants that they are eligible for the next examination for the position of Probationary Firefighter without regard to the maximum age limitation.

5. In fulfilling the hiring goal set forth in paragraph 2 above, the defendants may use such written screening devices or alternative systems of testing together with age and physical fitness criteria now used for measuring qualifications to become a Firefighter; provided, however, that the use of any written screening device shall not be a defense for failure to meet the interim hiring goals set forth in paragraph 2 above. Residence in the City of St. Louis shall continue to be a requirement for the selection of Firefighters.

6. If the defendants wish to use written examinations for qualifying or ranking applicants for the position of Firefighter in a manner inconsistent with the goal provided in paragraph 2, any such written examination must have been found to be job-related and validated by a criterion related study in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the Guidelines enunciated thereunder, including the Guidelines contained in 29 C.F.R. 1607.1, et seq., or otherwise have been shown to have no discriminatory impact. If defendants wish to utilize any such written examination, they shall furnish to plaintiffs, subject to appropriate protective orders, at least sixty days prior to any intended use, evidence of the absence of adverse impact and/or a copy of the validation study, and any other relevant information concerning the test and its validity. If the parties agree that the test has no adverse impact or has been validated in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the Guidelines thereunder, defendants may thereafter utilize the test. If the parties disagree,

the examination shall not be utilized unless and until the Court determines upon motion and such evidentiary hearing as it deems appropriate that the test has no adverse impact, or that it has been validated in accordance with Title VII as amended, and the Guidelines thereunder.

7. Defendants shall retain for a period of five years all records relating to the recruitment, selection and appointment of persons for the position of firefighter, including applications submitted by all applicants, identified by race, all medical and background investigation files, evaluations of applicants, eligibility lists and requisition forms with persons identified by race. Defendants shall also retain for a period of five years all records relating to performance in the firefighter training program and during the probationary period, including a statement in detail of the reasons for termination of any individual during training or during his probationary period. The plaintiffs' attorneys shall have the right to inspect and copy any or all such documents subject to appropriate protective orders upon reasonable notice to defendants without further order of the Court. In addition, defendants shall furnish the plaintiffs with such information or records as they may request in writing, provided that such requests shall not be unduly burdensome and that plaintiff pay all reasonable costs incurred in furnishing such information and records.

8. For purposes of this Decree, a reporting period shall run from July 1 through December 31 and from January 1 through June 30 for each year. The first reporting period shall begin on July 1, 1975. Within thirty days after the close of each reporting period, the defendants shall submit to the plaintiffs a written report (covering the preceding reporting period) containing the following information:

(a) The name, address, telephone number, date of appointment and race of each person appointed to the position of firefighter.

(b) The number of persons, identified by race, disqualified for appointment to the position of firefighter, classified by reason for disqualification.

(c) The name, address, telephone number, date of termination, and race of each person who was terminated or who resigned from the fire department prior to the completion of probation.

(d) The total number by race and rank of uniformed personnel on the Fire Department as of the close of the reporting period.

(e) A racially-identified copy of any eligibility list for firefighter established during that reporting period.

9. In case of conflict between the terms of this Decree and the Statutes of the State of Missouri, any rules or regulations of the Civil Service Commission, or any charter or ordinances of the City of St. Louis respecting the employment of employees of the fire department, the terms of this Decree shall prevail.

10. The Court retains jurisdiction of this action with respect to the issues raised by the plaintiffs with respect to promotion and terms and conditions of employment within the Fire Department and for such further relief or other orders as may be necessary or appropriate to enforce and insure rights to equal employment opportunity. At any time after five (5) years from the date of entry of this partial decree, defendants may move this Court on forty-five (45) days notice to plaintiffs for dissolution of this partial decree; and upon their showing that the goals of this decree in providing equal employment opportunities have been fully achieved, the decree may be dissolved.

APPENDIX V

United States District Court, Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, vs. City of St. Louis, et al., Defendants.	No. 74-200 C (4)
Firefighters Institute for Racial Equality, et al., Plaintiffs, vs. City of St. Louis, et al., Defendants.	No. 74-30 C (4)

NUNC PRO TUNC ORDER

(Filed June 28, 1976)

It Is Hereby Ordered that paragraph 19 of the memorandum filed herein on April 9, 1976 be and is deleted and there be substituted in lieu thereof the following:

> 19. With regard to entry level positions, the parties stipulated with the consent of the Court that the terms contained in Appendix A (Partial Consent Decree) would be observed by the parties pending final decision by this Court and would be incorporated in the final decree herein. 19a. The statistical evidence adduced establishes that the entry level examination had a disparate impact upon black applicants. Defendants have come forward with no evi-

dence of validation tending to show that this examination is related to job performance.

It Is Further Ordered that the first paragraph on page 26 of the memorandum commencing with the words "The parties are in dispute . . ." be and is deleted and there be substituted in lieu thereof the following:

> The statistical evidence established that the entry level examination had an adverse impact upon black applicants. Defendants have presented no evidence of validation. Absent such evidence, the examination may not be used to preclude appointment to entry level positions. See *Griggs v. Duke Power Co., supra; Boston Chapter, NAACP, Inc. v. Beecher, supra.* Accordingly, relief will be granted plaintiffs.

It Is Further Ordered that the order of this Court filed on April 9, 1976 be and is deleted and there be substituted in lieu thereof the following order:

Pursuant to the memorandum filed this date,

> It Is Hereby Ordered, Adjudged, and Decreed that, pursuant to the stipulation of the parties,
>
> 1. The defendants shall, as a long range goal, seek to recruit and hire blacks in sufficient numbers so as to achieve a racial composition in the ranks of Firefighters within the City of St. Louis Fire Department that is more representative of the racial and ethnic composition of the City of St. Louis as a whole. The goal shall be to achieve a racial composition of Firefighters in the St. Louis Fire Department which is comparable to the civilian labor force for the City of St. Louis subject to the availability of qualified applicants. In order to fulfill this goal and subject to the availability of sufficient qualified black applicants, defendants shall adopt and seek to achieve a goal of hiring blacks for at least fifty percent (50%) of the vacancies for the entry level of Firefighter personnel in the Fire Department for each year during the life of this decree. For purposes of compliance with this goal, only those blacks completing their probationary period shall be counted. In no case shall defendants be required to displace incumbent employees or to hire unneeded employees or unqualified employees in order to meet the goal.

> 2. The defendant City, through its officials and agents, shall take all reasonable steps consistent with its obligation to meet the goals set forth in paragraph 1 above, including contact with community organizations in the black communities, such as the Urban League and NAACP, and high schools with substantial minority enrollments, for the purpose of soliciting their help in informing minorities of employment opportunities in the fire department. The City shall also use its own resources, such as the facilities of the Personnel Department to recruit qualified minorities. Such effort on the City's part shall include announcements to radio, television, and other media directed at the black communities. The City shall also cooperate with and assist available independent programs which are aimed at recruiting minorities for the City Fire Department. The defendant City shall also utilize the services of incumbent black Firefighters in its recruiting efforts to the extent that such incumbents are willing and able to assist.
>
> 3. Defendants may make appointments from the current eligibility list for Probationary Firefighter so long as they meet the interim goals set out in paragraph 1, but in no event beyond the expiration of 2 years from the date of establishment of the list. Those blacks on the current list who are not appointed during this interim period and those blacks who applied and completed the written and physical agility tests in the 1971 and 1974 examinations but were

not placed on the eligibility list shall be informed by defendants that they are eligible for the next examination for the position of Probationary Firefighter without regard to the maximum age limitation.

4. In fulfilling the hiring goal set forth in paragraph 1 above, the defendants may use such written screening devices or alternative systems of testing together with age and physical fitness criteria now used for measuring qualifications to become a Firefighter; provided, however, that the use of any written screening device shall not be a defense for failure to meet the interim hiring goals set forth in paragraph 1 above. Residence in the City of St. Louis shall continue to be a requirement for the selection of Firefighters.

5. If the defendants wish to use written examinations for qualifying or ranking applicants for the position of Firefighter in a manner inconsistent with the goal provided in paragraph 1, any such written examination must have been found to be job-related and validated by a criterion related study in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the Guidelines enunciated thereunder, including the Guidelines contained in 29 C.F.R. 1607.1, et seq., or otherwise have been shown to have no discriminatory impact. If defendants wish to utilize any such written examination, they shall furnish to plaintiffs, subject to appropriate protective orders, at least sixty days prior to any intended use, evidence of the absence of adverse impact and/or a copy of the validation study, and any other relevant information concerning the test and its validity. If the parties agree that the test has no adverse impact or has been validated in accordance with Title VII of the Civil Rights Act of 1964, as amended, and the Guidelines thereunder, defendants may thereafter utilize the test. If the parties disagree, the examination shall not be utilized

unless and until the Court determines upon motion and such evidentiary hearing as it deems appropriate that the test has no adverse impact, or that it has been validated in accordance with Title VII, as amended, and the Guidelines thereunder.

6. Defendants shall retain for a period of five years all records pertaining to the recruitment, selection and appointment of persons for the position of Firefighter, including applications submitted by all applicants, identified by race, all medical and background investigation files, evaluations of applicants, eligibility lists and requisition forms with persons identified by race. Defendants shall also retain for a period of five years all records relating to performance in the firefighter training program and during the probationary period, including a statement in detail of the reasons for termination of any individual during training or during his probationary period. The plaintiffs' attorneys shall have the right to inspect and copy any or all such documents subject to appropriate protective orders upon reasonable notice to defendants without further order of the Court. In addition, defendants shall furnish the plaintiffs with such information or records as they may request in writing, provided that such requests shall not be unduly burdensome and that plaintiffs pay all reasonable costs incurred in furnishing such information and records.

7. For purposes of this Decree, a reporting period shall run from July 1 through December 31 and from January 1 through June 30 for each year. The first reporting period shall begin on July 1, 1975. Within thirty days after the close of each reporting period, defendants shall submit to the plaintiffs a written report (covering the preceding reporting period) containing the following information:

(a) The name, address, telephone number, date of appointment and race of each person appointed to the position of Firefighter.

(b) The number of persons, identified by race, disqualified for appointment to the position of Firefighter, classified by reason for disqualification.

(c) The name, address, telephone number, date of termination, and race of each person who was terminated or who resigned from the fire department prior to the completion of probation.

(d) The total number by race and rank of uniformed personnel on the Fire Department as of the close of the reporting period.

(e) A racially-identified copy of any eligibility list for Firefighter established during that reporting period.

8. In case of conflict between the terms of this Decree and the Statutes of the State of Missouri, any rules or regulations of the Civil Service Commission, or any charter or ordinances of the City of St. Louis respecting the employment or employees of the fire department, the terms of this Decree shall prevail.

9. At any time after five (5) years from the date of entry of this partial decree, defendants may move this Court on forty-five (45) days notice to plaintiffs for dissolution of this partial decree; and upon their showing that the goals of this decree in providing equal employment opportunities have been fully achieved, the decree may be dissolved.

It Is Further Ordered, Adjudged, and Decreed that defendants shall have judgment against plaintiffs on all remaining issues in these causes.

It Is Further Ordered, Adjudged, and Decreed that each party shall bear its own costs herein.

/s/ JOHN F. NANGLE
United States District Judge

Dated: June 28, 1976

APPENDIX VI

Before the
State Board of Mediation
State of Missouri

St. Louis Fire Fighters Association, Local No. 73, International Association of Fire Fighters, AFL-CIO, Petitioners, v. City of St. Louis, Missouri, Respondent.	Public Case No. 76-013

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION

Findings of Fact

This case appears before the State Board of Mediation upon St, Louis Fire Fighters Association, Local No. 73, International Association of Fire Fighters, AFL-CIO (hereinafter referred to as "Petitioner"), filing a Petition for Certification with this Board for exclusive bargaining rights for all Fire Department employees of the City of St. Louis, (hereinafter referred to as "City"), inclusive of the ranks of Private, Captain, Battalion Chief, Deputy Chief and Fire Alarm employees, all consisting of approximately one thousand (1,000) employees.

The State Board of Mediation has jurisdiction to hear and decide this matter pursuant to Section 105.525 R.S.Mo. 1969, which states in pertinent part:

> "Issues with respect to appropriateness of bargaining units and majority representative status shall be resolved by the state board of mediation."

A hearing was conducted by the Board at the St. Louis County Government Center in the City of Clayton, Missouri, at which time the following evidence was adduced.

The Fire Department of the City presently includes the ranks of Fire Chief, Deputy Fire Chief, Fire Marshall, Battalion Fire Chief, Fire Captain, Fire Lieutenant, Fire Prevention Inspector, Fire Fighter and Fire Equipment Dispatchers I, II, III. The Petitioner seeks to represent any and all units which may be found appropriate by this Board. The City has objected to the inclusion in an appropriate unit the positions of Fire Chief, Deputy Fire Chief, Fire Marshall, Battalion Fire Chief, Fire Captain, Fire Lieutenant, and Fire Equipment Dispatchers II and III for the reason that these individuals constitute supervisory personnel. The City contends that an appropriate unit should consist of Fire Prevention Inspector, Fire Fighter, and Fire Equipment Dispatcher I.

A description of the duties of the positions in dispute will be set forth in separate paragraphs in this opinion. The parties have stipulated that the position of Fire Chief be excluded from an appropriate unit, therefore we will not address ourselves to that position.

The Deputy Chief, of which there are four, (one presently serving as the Fire Marshall, whose duties will be described in the following paragraph) is a member of the General Staff of the Chief and assists in the administration of the Department. He is responsible for the effective application of the policy, Rules and Regulations, practices and procedures of the Department. His duties entail responding to multiple alarm fires, directing fire fighting operations, and making decisions regarding the need

for additional equipment. Further, he plans, schedules, supervises, and reviews the work of subordinates. He is responsible for making periodic inspections of personnel, quarters, engines, apparatus, tools, equipment, and records; prepares reports of conditions found and makes recommendations. He also reviews and reports upon the work of fire companies at fire drills and the conduct of in-service training programs. He works a twenty-four hour shift and lives with the other men, but during normal business hours he spends a majority of his time at the Fire Chief's office which is located in City Hall.

The position of Fire Marshall is presently held by a Deputy Chief and is a member of the General Staff of the Chief and assists in administration. This individual is responsible for the effective application of the policy, Rules and Regulations, practices and procedures of the Department in matters relating to fire prevention and fire protection. Further, he plans and supervises the inspection of designated occupancies throughout the City by Inspectors in his command, and he makes such inspections and investigations that may be necessary to evaluate the overall fire hazards in the City. He also has the authority to order subordinate officers to make necessary inspections. He works a five-day, forty-hour week and does not live with the other men.

A Battalion Fire Chief, of which there are presently thirteen of the twenty-three authorized positions, is in charge of the activities of one of the nine fire districts of the City. He has a number of Fire Captains under his command and he in turn reports to the Deputy Chief. He responds to alarms when dispatched, assumes command of fire fighting activities, and positions companies and apparatus for efficient rescue and extinguishment operations. He also has the responsibility of maneuvering the fire personnel under his command within his district so as to maximally utilize the available manpower. In addition, he has the responsibility for the paperwork of his district which

includes compiling reports of his Captains, making out various schedules, reports and requisitions. He also has the duty of enforcing division rules, regulations and orders. This individual works a twenty-four hour shift and lives in the fire house during his duty hours with the other men.

The position of Fire Captain, of which there are presently approximately one hundred sixty-one (161) of one hundred seventy-four (174) authorized positions, is in charge of the activities of a company of fire fighters which comprises approximately four (4) men. It is his responsibility to supervise and motivate the men in his company in all aspects of their jobs. It is his responsibility to insure that all apparatus and equipment to which he is assigned is in top condition, and that the house and quarters be kept clean and orderly. He leads his company at the fire scene. In addition, he handles the administrative duties which include keeping a daily log, preparing various schedules, making fire reports, and rating the men. He also has the responsibility of instructing his men in various aspects of the fire fighting profession. This individual works a twenty-four hour shift and lives in the fire house during his duty hours with the other men.

Fire Equipment Dispatcher III, of which there is one, is responsible for directing the activities of several groups of skilled workers engaged in the installation, maintenance, and repair of a variety of telephone and electrical equipment comprising a municipal alarm and signal communication center, and in the reception and transmission of fire alarm and emergency calls. He plans, assigns, and supervises the work of subordinate supervisors (Equipment Dispatcher II) and employees (Equipment Dispatcher I). He works independently, determining his own procedures, and receives administrative supervision from the Alarm and Signal Superintendent.

Fire Equipment Dispatcher II, of which there are approximately four, is responsible for supervising and participating

in the receipt of fire, rescue, and other emergency alarms, and the dispatching of fire fighting equipment. He supervises a crew of dispatchers (Equipment Dispatcher I) on an assigned shift. He is also responsible for posting entries in the section's daily log and reallocates fire fighting equipment to maintain constant coverage of all areas in the City. He works a rotation shift as does Dispatcher I.

The positions of Fire Equipment Dispatcher I, Fire Fighter, and Fire Prevention Inspector are not in issue and therefore will not be mentioned.

Conclusions of Law

Section 105.525 R.S.Mo. 1969 states:

> "Issues with respect to appropriateness of bargaining units and majority representative status shall be resolved by the state board of mediation . . ."

Appropriate unit is defined in Section 105.500 (1) R.S.Mo. 1969 as:

> ". . . a unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned."

It is the position of this Board that supervisors cannot be included in the same bargaining unit as employees whom they supervise, because of a lack of community of interest. Therefore, it is necessary to make a determination as to the positions which possess supervisory qualities. In the case of *Western Missouri Public Employees, Local 1812 and Missouri State Council 72, A.F.S.C.M.E. v. Jackson County, Missouri (Department of Corrections)*, Public Case No. 90, this Board set forth the factors which are considered in determining whether an employee is a supervisor. They are as follows:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employees.
2. The authority to direct and assign the work force.
3. The number of employees supervised, and the number of other persons exercising greater, similar or lesser authority over the same employees.
4. The level of pay, including an evaluation of whether the supervisor is paid for his skill or for his supervision of employees.
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employees.
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employees.
7. The amount of independent judgment and discretion exercised in the supervision of employees.

Upon a careful review of the duties and responsibilities of the position of Deputy Fire Chief, it is quite clear that he possesses supervisory authority and therefore should be excluded from an appropriate unit of non-supervisory employees. Without going into a detailed review of the Deputy Fire Chief's duties, it can be readily seen that all factors which constitute a supervisor are applicable to this position.

The position of Fire Marshal is excluded from an appropriate unit of non-supervisory employees due to the lack of community of interest this position possesses because of its supervisory identity and further, because of the lack of interchange between this position and that of the other employees. The Fire Marshal does not normally partake in the fighting of fires, nor does he work with or live with the other fire fighters.

This Board has carefully considered the duties and responsibilities surrounding the position of Battalion Fire Chief and is of the opinion that this individual constitutes supervisory personnel for the reasons that the majority of his time is spent in a supervisory capacity. It is true that he works the same shift and lives in the same house as the other fire fighters, however he has the responsibility of an entire fire district with direct authority to assign the work force. It is also true that he may fight a fire along with the other fire fighters, but this would only be in an emergency situation. The evidence is quite clear, therefore, that the position of Battalion Chief is supervisory and is to be excluded from a unit of non-supervisory personnel.

The position of Captain is not one of a supervisory nature as defined by this Board for the reasons that it is questionable as to whether the Captain has the authority to effectively recommend the hiring, promotion or discharge of employees, in this instance Fire Fighters. He supervises a small number of men and the evidence clearly indicates he is a working supervisor or leadman. There is a definite showing of a community of interest between the position of Captain and Fire Fighter. They fight the fire together in every aspect, they live together and work the same hours.

The position of Equipment Dispatcher III should be excluded from an appropriate unit of non-supervisory employees because of a lack of community of interest with the related positions of Equipment Dispatcher II and I. The competent and substantial evidence upon the whole record clearly supports this position.

The position of Equipment Dispatcher II, although clothed with the same supervisory activities which would warrant exclusion from an appropriate unit, has sufficient interest with the position of Equipment Dispatcher I so as to permit inclusion. Equipment Dispatcher II supervises a minimal amount of employees and spends his time working side by side the employees he supervises. This Board views the position of Equipment Dispatcher II as that of a lead or working foreman.

It should be noted that no evidence was offered regarding the position of Fire Lieutenant because it exists only as an ordinance classification and as of the date of this hearing it had not been effectuated. This position will be included in an appropriate unit.

Decision

It is the decision of the State Board of Meditation that an appropriate unit of Fire Department employees of the City of St. Louis is as follows:

> All Fire Department employees of the City of St. Louis including the positions of Fire Fighter, Fire Prevention Inspector, Fire Lieutenant, Fire Captain, Fire Equipment Dispatcher I and Fire Equipment Dispatcher II, but excluding the positions of Fire Equipment Dispatcher III, Battalion Fire Chief, Deputy Chief and Fire Chief.

Direction of Election

An election by secret ballot shall be conducted by the Chairman of the State Board of Mediation among the employees in the unit found appropriate, as early as possible, but not later than ninety (90) days from the date below. The exact time and place will be set forth in the notice of election to be issued subsequently, subject to the Board's rules and regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period, because they were out ill or on vacation. Ineligible to vote are employees who quit or were discharged for cause since the designated payroll period and who have not been rehired or reinstated before the election date. Those eligible shall vote whether (or not) they desire to be represented for the purpose of exclusive recognition by St. Louis Fire Fighters

Association, Local No. 73, International Association of Fire Fighters, AFL-CIO.

It is hereby ordered that the City shall submit to the Chairman of the State Board of Mediation, as well as to the Petitioner, within fifteen (15) days from the date of receipt of this decision, an alphabetical list of the employees in the unit determined above to be appropriate who were employed during the designated payroll period.

Entered this 23rd day of February, 1977.

STATE BOARD OF MEDIATION
/s/ MICHAEL HORN, Chairman
/s/ HARRY R. SCOTT, Employer Member

Dissenting

/s/ RICHARD MANTIA, Labor Member

Supreme Court, U. S.
FILED
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Nos. 76-1502 and 76-1668

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDWIN DAVID BANTA AND GEORGE HOHMANN, PETITIONERS

v.

UNITED STATES OF AMERICA AND FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, ET AL.

CITY OF ST. LOUIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FIREFIGHTERS INSTITUTE FOR RACIAL EQUALITY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-19)[1] is reported at 549 F. 2d 506. The opinion of the district court (Pet. App. A-23 to A-44) is reported at 410 F. Supp. 948.

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[1]"Pet. App." designates the appendix to the petition in No. 76-1502.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 1977, and a timely petition for rehearing was denied on February 25, 1977 (Pet. App. A-21). The petition for a writ of certiorari in No. 76-1502 was filed on April 28, 1977, and the petition in No. 76-1668 was filed on May 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a promotional examination for the position of fire captain in the St. Louis Fire Department, which excluded a disproportionately large number of black applicants but did not measure the paramount skill required for the job, violated Title VII of the Civil Rights Act of 1964.

2. Whether Title VII of the Civil Rights Act of 1964 may constitutionally be applied to state and local governments.

STATEMENT

The United States filed this case on March 18, 1974, pursuant to Sections 706 and 707 of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 261-262, as amended, 42 U.S.C. (and Supp. V) 2000e-5 and 2000e-6, alleging that the City of St. Louis had been and was engaged in a pattern or practice of racial discrimination in the employment practices of its Fire Department. A pending suit commenced by the Firefighters Institute for Racial Equality, Inc. ("F.I.R.E.") was consolidated with the government's suit. The Banta petitioners, representing a group of non-black employees of the Fire Department who held positions on the 1974 eligibility list for promotion to the rank of fire captain,

intervened in the consolidated actions.[2] The City of St. Louis and various officials with employment responsibilities are defendants in both actions.

1. The district court dismissed both suits (Pet. App. A-22). It held that the defendants had established that the promotional examination for the position of fire captain, which disproportionately screened out black candidates, was a reasonable measure of job performance (Pet. App. A-37, A-44).[3]

The court found that the examination for the entry level position of firefighter had a disparate racial effect and had not been validated (Pet. App. A-31). The court did not, however, hold that the use of the firefighter test violated Title VII.

The court also held that the exclusion of blacks from "supper clubs" in the firehouses was not the result of any action of the defendants and therefore did not violate Title VII (Pet. App. A-43).[4]

The United States filed a motion requesting clarification and amendment of the judgment, and on June 28, 1976, the district court entered an order finding the firefighter

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[2]The intervenors also included non-black applicants for employment who held places on the 1974 firefighter eligibility list.

[3]The position of fire captain is the first step above the entry level, and it is the first supervisory position in the Fire Department. A fire captain is responsible for supervising a group of firefighters and equipment and for training persons under his supervision (Pet. App. A-3, A-25 to A-26).

[4]Fire Department personnel, who spend a great deal of time living at the firehouse, had formed eating arrangements known as "supper clubs." Food and utensils were purchased jointly, and meals were cooked and eaten together. The City provided the cooking facilities in the firehouses (Pet. App. A-34 to A-35).

examination invalid under Title VII and granting injunctive and hiring relief (Pet. App. A-52).[5] In all other respects, the court adhered to its original judgment.

2. The court of appeals reversed in part, holding that the fire captain promotional examination was invalid and that the City's complicity in the exclusion of blacks from the "supper clubs" was illegal.[6]

The court held that the 1974 written examination for promotion to the position of fire captain had not been properly validated. The City had conducted a "content validity" study, which involved an analysis of the nature of the fire captains' jobs and an assessment of the extent to which the written test measured the ability of candidates to perform on the job. The court concluded that a "fatal flaw in the validation study" was that "[t]he captain's exam admittedly failed to test the one *major* job attribute that separates a firefighter from a fire captain, that of supervisory ability" (Pet. App. A-8, emphasis in original). Relying upon the Equal Employment Opportunity Commission's Guidelines on Employee Selection Procedures ("EEOC Guidelines" or "Guidelines"), the court held that the test could not be sustained because it "failed to test a job component comprising over 40 percent of the employee's time" (Pet. App. A-10).

The court of appeals also held that the city had a duty under Title VII "to provide a nondiscriminatory working environment" (Pet. App. A-16), and it therefore directed

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[5]No appeal was taken from this aspect of the district court's judgment (Pet. App. A-2).

[6]The court affirmed the district court's holdings (Pet. App. A-30 to A-31, A-35 to A-36, A-44) that F.I.R.E. had not established discrimination in the procedures for appointing battalion chiefs and in not promoting George Horne. See Pet. App. A-16 to A-17.

the district court to supervise the promulgation by the City of regulations providing that the "use of city facilities by supper clubs may not continue in a discriminatory and segregated manner" (*ibid.*). Petitioners do not contest this holding.

ARGUMENT

1. Both petitions assert that the court of appeals did not properly apply the EEOC Guidelines in determining whether the fire captain test—which concededly excluded blacks in disproportionate numbers—was job-related and therefore permissible under Title VII. The Banta petitioners also argue (Banta Pet. 15-18) that this Court should reexamine the question of the degree of deference that should be given to the Guidelines. The first contention involves only the application of settled principles to the particular facts of this case; the second, although presenting a question of law, is insubstantial.

a. The City attempted to demonstrate that the fire captain promotional examination was job-related by conducting a "content validity" study, a procedure that (Pet. App. A-7) "requires that the examination reflect a representative sample of the knowledge or behavior that will be used in performance of the job." The court of appeals did not disturb the finding of the district court that the City's expert properly analyzed the tasks involved in being a fire captain. The court concluded, however, that the test had a "fatal flaw" (Pet. App. A-8) because it "admittedly failed to test the one *major* job attribute that separates a firefighter from a fire captain, that of supervisory ability" (*ibid.*; emphasis in original).

While it may be true, as petitioners argue, that a test need not always assess every element of a job in order to be job-related, this principle does not assist them. Fire captains spend approximately 43 percent of their time in

supervision (Pet. App. A-8), and supervision is the only job element distinguishing a firefighter from a fire captain. A test that fails to seek out and credit supervisory skill therefore has very little value in predicting which firefighters would be good fire captains.

The court of appeals properly rejected petitioners' argument that supervisory skills could be assessed in a "six-month working test period" (Pet. App. A-10) after a candidate had been selected upon the results of the written test; the test itself screened out black firefighters without giving any assurance that those selected for the six-month trial were any more likely to be good supervisors than those who were denied the opportunity for a six-month trial.[7]

b. This Court recognized in *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 431, that the EEOC Guidelines are entitled to great deference, and, consequently, that courts should measure an employer's test validation study against the Guidelines. The Banta petitioners ask this Court to reassess that conclusion[8] in light of the promulgation and adoption by several federal agencies and departments, including the Department of Justice, of new Employee

[7]The City, moreover, had never used the six-month trial to demote inept supervisors (Pet. App. A-11), so that it was meaningless in practice.

[8]The St. Louis petitioners assert (Pet. 10-11) that *General Electric Co.* v. *Gilbert*, 429 U.S. 125, already has reduced the degree of deference due to the EEOC Guidelines. That decision, however, addressed a section of EEOC's sex discrimination guidelines (29 C.F.R. 1604.10 (b)) that the Court found to be in conflict with earlier pronouncements of the agency and contrary to the legislative history and plain meaning of the statute (429 U.S. at 142-145). The employee selection procedure guidelines at issue here (29 C.F.R. Part 1607) exhibit neither of those infirmities. The Court has continued to cite favorably the EEOC Guidelines at issue here. See *Dothard* v. *Rawlinson*, No. 76-422, decided June 27, 1977, slip op. 10 n. 15.

Selection Guidelines that differ in some respects from the EEOC Guidelines (Banta Pet. 17-18).[9]

Petitioners have not shown, however, that any of the differences in the guidelines would affect the outcome of this case. Whether the evidence of validation in the record is measured against the provisions of the EEOC Guidelines or the provisions of the federal executive agencies' guidelines, the promotional examination at issue is not job-related.[10] The differences between the two sets of

[9]The Equal Employment Opportunity Coordinating Council, which is composed of representatives from the Equal Employment Opportunity Commission, the Civil Rights Commission, the Civil Service Commission, and the Departments of Labor and Justice, has responsibility for developing policies to maximize effort, promote efficiency and eliminate inconsistency among the operations of the agencies and departments responsible for enforcement of federal equal employment opportunity law (Section 715, 42 U.S.C. (Supp. V) 2000e-14). In 1973 the Council began to draw up uniform guidelines on employee selection procedures. Since the EEOC determined that the resulting draft did not represent its views in some respects, the guidelines drafted by the Council were adopted only by the remaining Council members (41 Fed. Reg. 51734). The Department of Justice will, in the future, follow the joint guidelines in exercising its responsibilities under federal law, including Title VII; the EEOC will adhere to its own guidelines.

[10]Although the language of the federal executive agencies' guidelines concerning the requirements for demonstrating content validity is somewhat different from that of the EEOC Guidelines provisions, both sets of guidelines incorporate the "generally accepted professional standards" of the American Psychological Association (29 C.F.R. 1607.5(a), 41 Fed. Reg. 51985; 41 Fed. Reg. 51737). These standards, upon which the court of appeals relied heavily, provide (Pet. App. A-9) that: "An employer cannot justify an employment test on grounds of content validity if he cannot demonstrate that the content universe includes all, or nearly all, important parts of the job." The court of appeals correctly held that the test at issue did not meet that standard.

The Banta petitioners observe that the agencies' guidelines do not express a preference for any particular form of validation, while

guidelines are not material to this case; all federal agencies agree that the test is invalid, and at least within that area of agreement the guidelines continue to be entitled to great deference.

Petitioners contend that the EEOC Guidelines are not in accord with the intent of Congress to allow the use of employment tests (Banta Pet. 17). The statute permits an employer "to give and to act upon the results of any *professionally developed* ability test" (42 U.S.C. 2000e-2(h); emphasis added), so long as the test is not designed, intended, or used to discriminate.

This Court concluded in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433, and in *Albermarle*, *supra*, that the Guidelines implement the intent of Congress that employment tests not be given controlling force unless they are "demonstrably a reasonable measure of job performance" (*Griggs*, *supra*, 401 U.S. at 436). This conclusion is a sufficient answer to petitioners' statutory arguments.[11]

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the EEOC Guidelines prefer criterion-related validity studies (Pet. 17). But the court of appeals appropriately noted this difference and held that a properly prepared content validity study is acceptable under either set of guidelines (Pet. App. A-7). The problem in this case, as the court of appeals held, is that the fire captain test was not shown to be valid under *any* standard.

[11] *Washington* v. *Davis*, 426 U.S. 229, does not affect this rule. In *Washington* this Court acknowledged that test validation under Title VII involves a "more rigorous standard" than that applied under the Fifth and Fourteenth Amendments (426 U.S. at 247-248). When Title VII applies, however, job-relatedness continues to be required once it has been established that a test has a racially disproportionate effect. See *Dothard* v. *Rawlinson*, *supra*, slip op. 9-10. *Dothard* also disposes of the argument (Banta Pet. 11) that the requirements of Title VII apply less vigorously to public employment than to private employment (slip op. 10 n. 14). Public and private employers are treated alike under Title VII, so that *Griggs*, *Albermarle*, and the Guidelines are fully controlling here.

c. The St. Louis petitioners argue (Pet. 14-16) that the court of appeals incorrectly imposed the burden of proof upon them. Under Title VII, however, an employer bears the burden of showing that tests with a racially disproportionate effect are job-related. Cf. *Dothard* v. *Rawlinson*, No. 76-422, decided June 27, 1977, slip op. 9-10. If an employer meets its burden of proving that its tests are job-related, "it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albermarle Paper Co.*, *supra*, 422 U.S. at 425 (citation omitted).

This case never reached that point; the City never established that the fire captain test was job-related, and so it was unnecessary to show that other selection procedures could have been used. Nevertheless, the United States and the F.I.R.E. plaintiffs presented evidence that a technique, described by the City's expert witness (Pet. App. A-11) as "one of the most effective methods" of supervisory evaluation and utilized by him for other supervisory positions, was available. The court of appeals did not require the use of that technique, the assessment center, for testing the supervisory skills of prospective fire captains (Pet. App. A-12), but it properly concluded that the existence of an effective alternative method of selection was a persuasive reason to require petitioners to abandon the test presently used unless it was validated. In so doing the court did not apply an improper burden of persuasion.[12]

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[12] The Banta petitioners assert (Pet. 10-11) that there is a conflict among the lower federal courts concerning the allocation of the burden of persuasion in Title VII cases. We believe that this "conflict" is more semantic than real; the governing standards have been established in *Griggs*, *Albermarle*, and *Dothard*, and that ground need not be repatrolled by this Court. See also *International Brotherhood of Teamsters* v. *United States*, No. 75-636, decided May 31, 1977, slip op. 16.

2. The Banta petitioners argue (Pet. 8-11) that Title VII may not constitutionally be applied to the States and their subdivisions. The St. Louis petitioners, on the other hand, do not present this as a question for review by this Court.[13] The Banta petitioners do not include any governmental entity, and it is far from clear that they, as private parties, are entitled to raise a claim of governmental immunity of this sort (cf. *National League of Cities* v. *Usery*, 426 U.S. 833, 837 n. 7).

Moreover, the court of appeals declined to consider this attack upon Title VII because it had not been raised in the district court (Pet. App. A-5 n. 5). The Banta petitioners contend (Pet. 12-15) that this was error, both because a party may support its judgment with arguments not raised below and because an intervening change in the law (this Court's decision in *National League of Cities*) permits the raising of new arguments.

We agree with petitioners that a party may support a judgment with arguments rejected or not passed upon in a lower court. See *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479. This rule does not, however, permit the injection of new issues into a case on appeal as a matter of right. The usual rule is that a respondent or appellee "may make any argument *presented below* that supports the judgment of the lower court." *Hankerson* v. *North Carolina*, No. 75-6568, decided June 17, 1977, slip op. 6 n. 6 (emphasis added). A court of appeals need not consider contentions not presented in the district court; it might, as a matter of discretion, consider them or remand the case to the district court to pass upon them in the first instance, but it is not obligated to do so. See *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16.

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[13]Although they allude (Pet. 16) to the Banta petitioners' arguments, the St. Louis petitioners do not state the constitutionality of Title VII as a question presented (Pet. 2-3).

The question whether Title VII may constitutionally be fully applied to the States is one of considerable importance. This Court has declined on two occasions to consider it, once because it was not raised in the district court (*Dothard* v. *Rawlinson*, *supra*, slip op. 1 n. 1) and once because the issue was not squarely framed by the facts (*Hazlewood School District* v. *United States*, No. 76-255, decided June 27, 1977, slip op. 6-8 n. 12). In the present case the court of appeals soundly exercised its discretion by not reaching out to consider an issue that had not been presented to the district court, and the question consequently is not before this Court.

However that may be, we submit that Title VII is a constitutional exercise of Congress' power to enact legislation to enforce the Fourteenth Amendment. The difference between Title VII and the ordinary command of the Equal Protection Clause of the Fourteenth Amendment is, as this Court held in *Washington* v. *Davis*, 426 U.S. 229, that Title VII dispenses in some cases with the requirement that the plaintiff prove a racially discriminatory motive. Title VII was designed to cope with "the consequences of employment practices, not simply the motivation" (*Griggs*, *supra*, 401 U.S. at 432; see also *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 136-137). Congress concluded that it was necessary in some cases to reduce the role played by discriminatory purpose, because proof of such a purpose is a difficult, and in some circumstances insuperable, burden to place upon the victims of subtle discrimination.

It is not unusual for Congress to abolish the requirement of discriminatory purpose and to reallocate the burden of persuasion. The Voting Rights Act of 1965, for example, was designed to afford to historic victims of discrimination the benefit of inertia and favorable burdens of persuasion; this Court upheld it as a legitimate exercise of

the power to enforce the Civil War Amendments. See *South Carolina* v. *Katzenbach*, 383 U.S. 301; cf. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, No. 75-104, decided March 1, 1977. Similarly, the Court has upheld other congressional alterations of voting laws, despite a recognized variance between the statutes and the rules that Section 1 of the Fourteenth Amendment created of its own force. See *Katzenbach* v. *Morgan*, 384 U.S. 641; *Oregon* v. *Mitchell*, 400 U.S. 112. See also *Ex parte Virginia*, 100 U.S. 339, 347-348 ("the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete"). The Court summarized some of these cases in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 455: "There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative sphere of autonomy previously reserved to the States."

Title VII is an appropriate exercise of congressional power. *Fitzpatrick* relied upon Title VII as the authority for an award of back pay and attorneys' fees against a governmental body, and the Court expressed no doubt about the constitutional authority of Congress. Title VII does not involve any interference with the discretion of state and local governments to determine the number of employees they will hire, the functions they will perform, the hours they will work, or the wages they will be paid. The States' ability to determine for themselves the structure and functions of government is unimpaired. Title VII is no more than a proper legislative measure to ensure that States and their subdivisions will not discriminate—subtly or otherwise—on the basis of race or other improper criteria.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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